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THE

MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK,

OTHER THAN THE COURT OF APPEALS AND THE GENERAL TERMS OF THE SUPREME COURT,

INCLUDING THE

SUPERIOR COURT IN THE CITY OF NEW YORK, COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK, SUPERIOR COURT OF BUFFALO, CITY COURT OF BROOKLYN, CITY COURT OF NEW YORK, SURROGATES' COURTS, ETC., ETC.

IN PURSUANCE OF

LAWS OF 1892, CHAPTER 598.

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REPORTER.

VOLUME II.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK,

COMMENCING DECEMBER, 1892.

CLOSE *v.* POTTER.

CLOSE *v.* BEALS.

CLOSE *v.* MILLRING.

(Buffalo Superior Court — General Term, December, 1892.)

In May, 1892, plaintiff recovered judgment against a corporation organized under the Manufacturing Act (Laws 1848, chap. 40), upon its note given for money loaned and after the return of an execution thereon wholly unsatisfied, brought action against defendants as stockholders. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and contended that the act of 1848, chapter 40, under which the corporation giving the note was organized, had been repealed by chapter 564 of the Laws of 1890. *Held*, that the act of 1890, was substantially the same as the corporation laws which it was intended to supersede; and that as the repealing clause of the act of 1890, took effect simultaneously with the re-enactment of the statute it did not affect existing corporations except so far as it amended or modified the law under which they were incorporated. Demurrer overruled.

DEMURRER to complaints. The opinion states the case.

Simon Fleischmann, for plaintiff.

Frank F. Williams, for defendant.

TITUS, Ch. J. The above cases, involving the same question, were all argued at the same time. But one brief was furnished, that in the case of Charles J. Close against Edward

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W. Potter. The questions arose upon a demurrer to the plaintiff's complaint. The plaintiff, in his complaint, claims that on the 12th day of December, 1887, the American Bit Brace Company was organized under the act to authorize the formation of corporations for manufacturing, mining, mechanical or other purposes, passed February 17, 1848; that the capital stock of the company is $50,000, but that the whole amount of the stock has not been paid in, and that no certificate has ever been filed as required by law; that on the 2d day of January, 1892, $10,000 was advanced and loaned to the company, it in return giving its note for that amount, and that the plaintiff is the owner and holder of it; that after the note became due, and on May 23, 1892, the plaintiff brought an action against the American Bit Brace Company on the note, and recovered a judgment for the amount, with interest and costs; that the judgment was docketed and execution issued to the sheriff of Erie county, where the company has its place of business, and the same was returned wholly unsatisfied; that at the time the debt was contracted by the company, the defendant Potter was a stockholder to the amount of $2,400, and demands judgment for $2,400.

The defendant demurs to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The only question which the defendant raises by the demurrer in his brief, is that chapter 40 of the Laws of 1848, which is the act under which the American Bit Brace Company was incorporated, has been repealed, and the corporate existence of the company, after the revision of the Corporation Laws took effect, namely on May 1, 1891, has ceased, and that at the time this debt was incurred on the 2d day of January, 1892, the company had no legal existence, and consequently no authority to create any liability against the company upon which a stockholder can be held.

By section 10 of the act of 1848 "stockholders shall be severally individually liable to the creditors of the company of which they are stockholders to an amount equal to the amount of stock held by them respectively for all debts and

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contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in." Section 24 of the same act provides: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due, and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company."

In 1889, the legislature passed an act (Chap. 289), to revise and consolidate the general statutes of the state relating to the organization, government and control of corporations, and other statutes. In 1890, the commission appointed in pursuance of this act, reported to the legislature various acts relating to corporations. These acts, on examination, appear to be substantially the same as the corporation laws which they are intended to supersede; in some instances amendments have been introduced and modifications made to the language used in former acts.

These acts are practically a consolidation and revision of the statutes of the state, evidently following a systematic plan adopted by the revisers.

Chapter 564 of the Laws of 1890, is the act which has reference to stock corporations, and is the only one which it is necessary to consider here. Section 72, relating to the construction of the act, provides that the act "shall be construed as a continuation of such laws, modified or amended, and not as a new enactment." By this, chapter 40 of the Laws of 1848 is repealed. Section 57 is a re-enactment of section 10 of chapter 40 of the Laws of 1848, with a slight amendment. It provides: "The stockholders of every stock corporation shall jointly and severally be personally liable to the creditors to an amount equal to the amount of stock held by them

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respectively for all debts and contracts made by the corporation until the whole amount of its capital stock shall have been paid in." Section 58 is a re-enactment of section 24 of the act of 1848, and provides that "no stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due."

It will be seen that the only changes made in these sections are that, while the act of 1848 made the stockholders severally liable, the act of 1890 created a joint and several liability, and instead of the stockholder being liable for the debt of the corporation not payable within one year, the amendment extends it to two years, and the same is true of the right to bring an action against the corporation, being extended to two years, instead of one, as provided in the act of 1848.

Section 72 provides what construction shall be placed upon the act itself, namely, that it shall be considered as a continuation of such laws, modified or amended, and not as a new enactment. This of itself is sufficient authority for holding that the law of 1848, was not repealed by the act of 1890, so as to affect companies organized under it.

Independently of this saving clause, it cannot be presumed that the legislature intended to repeal the act under which the American Bit Brace Company was incorporated, in the sense that it is now without corporate existence and not subject to the general law governing corporations. Such a construction would work great harm and confusion to the business interests of the state, and is not to be so construed unless it can be clearly seen that the legislature intended such a result. It is rather to be construed in harmony with the general policy of the legislature to revise and consolidate the general statutes, re-enacting and continuing them, without affecting the rights of corporations organized under them. The repealing clause of the act took effect simultaneously with the re-enactment of the statute, and did not affect existing corporations, except so far as it amended or modified the law under which they were

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incorporated. *People ex rel. Uelrich* v. *Bell*, 4 N. Y. Supp. 869.

The only change made by the new act, so far as it is applicable here, was to make stockholders jointly and severally liable, when before they were severally liable, and extending the limit to debts not to be paid within two years from the time such debts became due.

The debt which is sought to be recovered here, originated in January, 1892, and is subject to the new provisions of the new act. The change in limitation made by the act of 1890, does not affect the question here, because it enlarges the time in which a party may act, and either under the act of 1848, or 1890, the plaintiff has commenced his action in time. The debt was payable within one year from the time it was contracted, and the year has not elapsed. The action was commenced on the note on the 23d of May, 1892, less than five months from the time the note was given.

The legislature of 1892, by chapter 688, re-enacted the act of 1890, without any essential change in the language of the statute, and did not, except by implication, repeal the act, but by chapter 677 of the same year, section 32, it was enacted that so far as the revised act was substantially the same as the statute existing at the time the act takes effect, it shall be construed as a continuation and not as a new enactment, so that in any event the acts of 1892, can have no effect upon the rights of the party to this action, because the statute itself has provided a rule of construction which the court must follow.

This would be so in the absence of the continuing act. The rights of the parties had become fixed before the act took effect, and the defendant's liability must be measured by the law as it stood when the debt was contracted, and no act of the legislature can have the effect to change or affect the existing liability. *People* v. *Supervisors of Westchester Co.*, 4 Barb. 64; *Conant* v. *Van Schaick*, 24 id. 87; *Story* v. *Furman*, 25 N. Y. 214; *Town of Cherry Creek* v. *Becker*, 123 id. 161.

The claim made by the defendant that by chapter 567 of

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the Laws of 1890 corporations may reorganize, and that the American Bit Brace Company has not reorganized under that act and has no legal existence, is not well taken. It has already been seen that no reorganization was necessary, that the act was not repealed so as to affect the rights of corporations organized under it, but chapter 567 of the Laws of 1890 has reference especially to business corporations, and not to such as are organized under the Stock Corporation Law of 1848. Besides the language is permissive. The statute leaves it optional with the stockholders whether they will reorganize or not, and in case the corporations provided for under that act did not reorganize, their corporate existence is not offered by such lack of reorganization. The cases cited by the defendant to sustain this proposition are not applicable, for the reason, as has been said, that corporations organized under the act of 1848 are not affected by the repealing clause of the act of 1890.

The defendant claims that the Stock Corporation Laws of 1890 were expressly repealed by chapter 687 of the Laws of 1892. I do not find such to be the case, unless it is by implication. Undoubtedly the act of 1890, has been superseded by the more recent act of the legislature; but assuming that it is repealed, I do not think it helps the defendant in his contention, for the same reason which has been stated with reference to the effect of the act of 1890 upon the act of 1848. But by chapter 677 of the Laws of 1892, known as the Statutory Construction Act, section 31, it is provided that the repeal of a statute shall not affect or impair any act done, or right accrued, or liability incurred, but that the same may be asserted and enforced as fully and to the same extent as if such repeal had not been effected. These revision acts of 1892, were all passed and took effect on the same day, and they should all be construed together, as such evidently was the intent of the legislature.

This disposes of the questions raised by the defendant, and if the law has been correctly stated, it leads to the conclusion that the demurrer is not well taken. I think, therefore, that

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the demurrer should be overruled, with leave to the defendant within twenty days to answer, on payment of costs.

Demurrer overruled.

People ex rel. Reynolds v. The Common Council of the City of Buffalo.

(Buffalo Superior Court—General Term, December, 1892.)

After the confirmation of an award made in proceedings to appraise the damage to relator's property occasioned by a local improvement, and before the defendant's common council had audited the claim, the statute under which the award was made was repealed and audit refused The charter of Buffalo, provides that "the common council shall audit all claims against the city of Buffalo." *Held*, that the award was a liquidated claim against the city of Buffalo, and that the remedy by mandamus to enforce its payment was proper.

Appeal from an order granting a peremptory mandamus directing defendant to audit a certain claim of Amelia Reynolds, referred to in the opinion.

George M. Brown, for defendant (appellant).

Daniel McIntosh and *O. O. Cottle*, for plaintiff (respondent).

Titus, Ch. J. This proceeding is instituted under chapter 393 of the Laws of 1890, authorizing the city of Buffalo to audit and adjust the amount of damage which has been occasioned to the property of Amelia E. Reynolds.

In 1885, certain proceedings were instituted by the city of Buffalo to take lands necessary to extend Elmwood avenue from Butler street to North street. The land of the respond ent adjoined property through which the street passed.

On this land was a large double house, a part of which was on the property taken, and the other part on the land of the respondent. No portion of the property of the respondent was taken in opening Elmwood avenue, but in removing the portion of the building on the land taken by the city for the improvement, great damage was done to the portion of the house on the respondent's land. The commissioners in that

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proceeding did not award the respondent damages, because none of her property was taken, and no authority was found to authorize an award to her.

The legislature then passed an act (Chap. 393 of the Laws of 1890), under which the present proceeding was taken. Commissioners were appointed by the court, as provided by the act, to appraise the damage to respondent's property. They made their report and awarded her $5,500. The report was confirmed by the court on the 10th day of February, 1891. On the 3d day of March, 1891, and before the common council had audited and adjusted her claim, the legislature repealed the act of May, 1890 (Chap. 42 of the Laws of 1891).

An application for a peremptory writ of mandamus was made at a Special Term of this court, which was granted, commanding the common council to audit and adjust the amount of damages occasioned to the property of the respondent at $5,500, the sum fixed by the commissioners in their report, and to raise the same by assessment upon the property benefited by the opening of Elmwood avenue. An appeal by the common council from that order, brings before us the questions we are to consider.

Before the passage of the act of 1890, Mrs. Reynolds had entered into an agreement with the city of Buffalo, in consideration of the sale to her of the building upon the property taken in opening the street, to release the city from all damages which her property had sustained by reason of the opening of the street and the tearing down of one-half of the building.

An appeal was taken to this court from an order denying a stay of the proceedings of the commissioners appointed to award damages to the respondent, and many of the questions here raised, were passed upon adversely to the city on that appeal, among them the regularity of the proceedings and the validity of the statute under which they were instituted, chapter 393 of the Laws of 1890, and the right of the legislature to authorize the city to pay the respondent whatever sum she was equitably entitled to, the force and effect of the con-

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tract made by Mrs. Reynolds with the city, namely, that it did not estop her from claiming damages under that act, but that if she had received anything under the agreement with the city it must be allowed in reduction of any award of damages to her. It appears from their report, that the commissioners did take the agreement into consideration and credit the city on such award with the value of the materials which she had received under her contract. So far as these questions are concerned, this court has passed upon them, and they must now be considered *res adjudicata* and not open for further consideration, at least here. *Culross* v. *Gibbons*, 130 N. Y. 447.

The learned counsel for the defendant claims that the act of 1890, chapter 393, is permissive and not mandatory. The language used in the act is not different from that used in the many cases where this question has been before the courts. In *People ex rel. Conway* v. *Board of Supervisors of Livingston Co.*, 68 N. Y. 114, the same language was used by the legislature, and the court held it was mandatory. Judge EARL, in his opinion, said: "Where the public interest or private right requires that the thing shall be done, then the word 'may' is generally construed as 'shall,'" and a peremptory writ of mandamus was ordered. In *People* v. *Board of Supervisors of Otsego Co.*, 36 How. Pr. 1, it was held that where the legislature authorized and empowered the board of supervisors to cause taxes illegally assessed and paid to the county to be repaid, it became their duty to do it, and a peremptory writ of mandamus was ordered. On appeal to the Court of Appeals, 51 N. Y. 401, the court held that the statute was mandatory, the court saying that the words "authorized and empowered" are mandatory when the statute directs the doing of a thing. Many other cases have been examined, but enough have been cited to illustrate the rule that where a party has a claim based upon natural justice and equity, permissive words in a statute are construed so as to accomplish what the legislature intended.

The counsel for the appellant claims that the statute requires the expense of the proceeding to appraise such damages to be

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included in the amount of damage to be raised by local assessment, and the order only requires the common council to raise the amount of damage, not including the expense of the proceeding; that the common council is without power to comply with the order, the only authority being the statute in question. It is perhaps a sufficient answer to this that chapter 42 of the Laws of 1891, which is the act repealing chapter 393 of the Laws of 1890, provided that the commissioners appointed under the act repealed, should be paid by the city out of the general fund, and it appears that the expense of the proceeding was paid by the city without waiting to include it in the amount of damage to be raised. No reason can be assigned why the city may not include the expenses of the proceeding in the amount of damage to be assessed and reimburse the general fund out of which it was paid, unless it be the act of 1891, above referred to. Certainly nothing in the order forbids it, and if the charter authorizes, it it may well be included in the amount to be raised I do not think it is material as affecting the powers of the common council to comply with the mandamus.

By the act of 1890, the city was to audit and adjust the amount of damages to the respondent's property, after the amount of such damage had been appraised, and the claim of the counsel for the appellant that the commissioners had no authority to "make an award" to her for damages to her property is, it seems to me, without force. The statute contemplates an appraisal of her damage, and the fact that in their report they say they "make an award for damages to her property" adds nothing to the force of the statute, as the statute "awards" the amount of damage appraised to her, and when the common council have appraised the damage, the statute directs to whom it shall be paid.

The principal claim made by the appellant is that the act of 1890 has been repealed, and, therefore, there is no law authorizing or requiring the common council to audit and adjust the damages. The counsel's reasoning seems to rest upon the assumption that the respondent has no claim which she can

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enforce after the statute has been repealed. In this I think he is mistaken. It is not claimed that if this was an award by commissioners in eminent domain proceedings and confirmed by the court it would not then be a valid claim against the city and have the force and conclusiveness of a judgment with all of its incidents, including that of contract. *Mayer* v. *Mayor, etc.*, 101 N. Y. 284.

But it is insisted that these are not eminent domain proceedings, and consequently no such character or force attaches to the award of the commissioners. While it is not a proceeding directed against the property of another for a public purpose, the statute clothed it with the character of such a proceeding, and when the report was confirmed by the court its character was not changed. It had ripened from its equitable nature into a legal and valid claim against the city. The respondent's damages had been ascertained and fixed; it was then enforcible against the city, and under the authorities it is difficult to see how the legislature could divest her of the claim. *People* v. *Board of Supervisors of Westchester Co.*, 4 Barb. 64; *In the Matter of the Commissioners of Washington Park*, 56 N. Y. 144; *In the Matter of the Rhinebeck, etc., Co.*, 67 id. 242.

I do not think it necessary to refer to the statute of 1890 for authority to pay the claim, assuming it to be a valid and legal claim after the report was confirmed.

Section 15, of the revised charter provides that "the common council shall audit all claims against the city of Buffalo." A like provision is found in the old charter, and it confers upon that body power to audit all claims. This is a liquidated claim. Nothing is to be done in addition to what has already been done to fix the amount. It has been determined in the manner directed by law, and the power conferred upon the common council is ample, in the absence of the statute of 1890, to audit and adjust it. The right is clear and the amount is not in dispute, therefore, I think the remedy by mandamus to enforce its payment is proper. It is damage occasioned by a local improvement and should properly be assessed upon

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the property benefited by the improvement. The order appealed from should be affirmed, with ten dollars costs and disbursements.

WHITE, J. (dissenting). In 1885, the city of Buffalo instituted proceedings in eminent domain to acquire the title to lands for a public street. At that time (it may be assumed) the relator was the owner in fee of a parcel of land situated on the north side of North street, and that George C. Greene was the owner of a parcel of land adjoining that of the relator on the east. These parcels of land were three hundred and twelve feet deep, with a frontage of about eighty-eight feet on North street. Prior to 1885, and before the eminent domain proceedings had been instituted, there had been erected a large and costly brick double house, covering the North street front of the lands of said Greene and the relator, the partition wall of which was the division line between said lands, and which was some three feet west of and parallel to the street to be opened and called Elmwood avenue. The title to the lands necessary for the street, was acquired by the city, and it proceeded to, and did demolish the easterly half of this house, leaving the title to said three foot strip in said Greene. The demolition and removal of the easterly half of this house necessarily greatly damaged and impaired the value of the remaining half of the house which stood on the land of the relator. The relator appeared and took part in the proceedings in eminent domain, and claimed that she was entitled to have an award made to her in those proceedings for the damages which she had sustained. The claim was disallowed on the ground that her property did not abut upon the street to be opened, and none of her property had been taken by the city for the proposed improvement, and this determination was acquiesced in by all parties. The proceedings in eminent domain were concluded by final determination on the 11th day of May, 1886. On August 9, 1886, the city requested the legislature to pass a law authoriz-

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ing it to make just compensation for the injury which had been inflicted upon the relator. Afterwards, and on July 28, 1887, the relator and the city entered into an agreement in writing and under seal, whereby, among other things, the city conveyed and delivered to her a lot of building material, sidewalks, trees, and other property, to which it had acquired the title from said Greene in said eminent domain proceedings, and in consideration of such conveyance and delivery, the relator covenanted and agreed that she would, and thereby did relinquish all claim against the city, which she had or claimed to have or hold, or which she might thereafter have, or which might accrue to her by reason of any injury or damage that might result to her premises in consequence, or as the result of the opening of said street, and by which she released and acquitted the city from the payment to her of any claim for damages that might accrue as aforesaid; and the relator further covenanted and agreed that she would, and did thereby waive, relinquish, abandon and withdraw all objections to, and rights and claims which she had or might have in consequence of any irregularity, illegality or invalidity of the assessment made or levied against her, or upon her lands and premises, for the payment of any awards or expenses in the said proceedings in eminent domain, or the assessment-roll in connection therewith, and that she would take no proceedings to annul or invalidate the same. The relator, thereupon, in pursuance of said contract, took and received the property so conveyed to her by the city, and no attempt has ever been made to abrogate or rescind that contract.

On May 21, 1890, the legislature passed an act authorizing the city to audit and adjust the amount of damage sustained by the relator in consequence of the opening of the street in question, and directing that when ascertained, as provided by the act, the amount should be raised by assessment upon the property deemed to have been benefited by the opening of the street. The method of procedure prescribed by this act was by three commissioners, to be appointed by this court. Commissioners were thereupon appointed, who reported to

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the court on the second day of February, 1891, appraising the damages at $5,500, and on the tenth day of February, 1891, the report was approved by the court. Before these commissioners reported, but after they had taken evidence as to the merits of the claim of the relator, on a motion by the city for a stay of proceedings, the fact of the making of the contract of July 28, 1887, was called to the attention of the court, and it ordered that unless the commissioners should be authorized by the relator to deduct from the amount of any damage which the relator might have sustained the value of the property received by her under that contract, the motion for a stay should be granted. The relator consented to the conditions imposed, and the motion for a stay was denied. An appeal from the order denying the motion was taken to the General Term, where it was affirmed.

On September 21, 1891, the relator requested the city to audit the claim made by her and take the steps requisite to insure its payment, which the city refused to do. Thereupon this proceeding was instituted by an alternative writ of mandamus, requiring the common council to audit and adjust the claim of the relator, and proceed to raise the amount by assessment, etc., or show cause to the contrary. The return to the writ alleges substantially the facts as hereinbefore recited. There was no traverse by the relator to the return.

I have read with much care and profit the opinion of ex-Judge Beckwith, which was written on the motion made by the city of Buffalo in January, 1891, for a stay of proceedings in this case to enable the city to procure a repeal of the act of the legislature of May 21, 1890, on the ground that the existence of the contract between the relator and the city, of July 28, 1887, was not before known to the corporation counsel, who made the motion, the contract having been made under the directions of his predecessor in office. I have also read the learned opinion of Judge Hatch, written upon the trial of the issues raised by the writ of mandamus and the return thereto.

It is claimed by the respondent that the decision of the

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General Term of this court, which affirmed the order denying the motion of the city for a stay of proceedings is *res adjudicata* as to the power of the legislature to pass the act of May 21, 1890, and to the effect that the contract of July 28, 1887, did not estop the relator from enforcing her claim under that act of the legislature. The record which was before the General Term when that decision was made, is not now before us, but it is evident from the opinion of Judge BECKWITH, which is published in the report of the case in volume 48 of the New York State Reporter, at page 627, that in the affidavits read on the motion for a stay of proceedings, claims were made by the relator and the city for and against the validity of the contract of July 28, 1887, and that the parties ought to have the privilege of trying that question upon the merits. The failure of the relator to traverse the return to the writ of mandamus left the allegations of the return upon that subject undisputed, and therefore, to be taken as true for the purposes of the trial of the issues. No claim was thereafter made by the relator on the trial of the issue that she was entitled to any relief against her contract of July 28, 1887, or that she had executed or performed said contract under or by reason of any fraud, misrepresentation or mistake. The facts, as disclosed by the record on the appeal from the order denying the motion for a stay, may have differed from those disclosed by the record on this appeal in other respects.

But even if the decision of our former General Term upon the appeal from the order denying the motion for a stay of proceedings were based upon a record substantially the same as the one before us, yet we are not thereby prevented from reconsidering the case upon its merits, and, if need be, reversing or modifying that decision. The doctrine of *stare decisis* is never applied so as to prevent a court from reconsidering, reversing or modifying its own decision if deemed contrary to principle, where it will not affect transactions entered into nor titles to property, or property rights acquired upon the faith of the erroneous decision. The force of the doctrine is measured somewhat by the nature of the question decided.

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There can be no doubt that the court should exercise great care and caution in reconsidering a question once decided by it upon the merits, but when convinced that it has made an erroneous decision, which can be corrected without material injury to any one, it is the duty of the court to make the correction.

The rule which I think is applicable to the case before us, by us, is stated in the celebrated legal tender cases, reported in 12 of Wallace's Reports, in the opinion by Mr. Justice STORY of the United States Supreme Court, in the following language: "In cases involving only private rights if convinced we had made a mistake we would hear another argument and correct our error," or, as Judge SMITH says in the case of *Olcott* v. *Tioga R. Co.*, 26 Barb. 157: "The 3,000 cases overruled, doubted or limited in their application mentioned in Greenleaf's overruled cases indicate that the tendency to assert and carry out what is supposed to be the right in point of principle is much greater than that of abiding by precedents and of adhering to decisions." Although this case was reversed on other points by the Court of Appeals, the language quoted as to the doctrine of *stare decisis* was approved.

The status of the case at bar, is so radically different from that which in my opinion it ought to be, that I am impelled, with deference and respect for the former decision of the court and at the risk of being charged with temerity, to a discussion of the matter upon its merits.

In the proceedings in eminent domain for opening Elmwood avenue it was claimed by the city that none of the relator's property was taken, and that, therefore, she was not entitled to an award for the damages sustained by her. Whether or not property of the relator was taken within the spirit and true intent of the Constitution, which prohibits the *taking* of private property for public use without just compensation, is not now open for consideration because the relator in those eminent domain proceedings acquiesced in the claim made by the city on that subject; the final determination in those proceedings adjudicated to that effect with her consent, and there-

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fore and thereby she was forever debarred from demanding any compensation at the hands of the city for the damages which she claims to have sustained, as a legal or equitable claim recognized by or enforceable at law or in equity.

Such final determination in the eminent domain proceedings made with the consent of the relator, placed her in the category of owners of property taken for public streets to whom is applicable the language of the Court of Appeals in the case of *Radcliff's Executors* v. *Mayor of Brooklyn*, reported in the 4th of Comstock's Reports, at page 207, as follows:

"The opening of a street in a city is not necessarily an injury to the adjoining landowners. On the contrary, it is in almost every instance a benefit to them. In some instances the landowner will suffer a heavy loss; and this case may perhaps be one of the number, but it is *damnum absque injuria* and the owner must bear it."

If now it be true that at the time of the passage by the legislature of the act of May 21, 1890, the relator had no claim which either the law or equity would recognize or enforce, and it had been so adjudged by the final determination in the eminent domain proceedings, the act in question is void, because it in effect creates or authorizes the creation of a claim in favor of the relator against the city and its enforcement for a cause which had theretofore been adjudged insufficient for that purpose by due process of law, and for a cause which the courts have condemned times without number. The final determination of the eminent domain proceedings was in effect a judgment, and finally fixed and determined the rights of all the parties thereto, including the relator, and that is the reason why the act of March 3, 1891, repealing the act of May 21, 1890, could not be invoked by the city as authority for divesting the relator of the rights supposed to have been secured by her judgment under the last-named act. See authorities cited by Judge HATCH on page 41–43 of the printed case. And by virtue of that determination the rights of the city became vested, so far as the lands taken by it for Elmwood avenue are concerned, and so far as its acts in that

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behalf in removing the easterly half of the double house which caused the damage to the relator are concerned. As to the city, the act of May 21, 1890, was clearly retrospective, and designed to impose upon it a liability not recognized or enforceable at law or in equity, and a liability which by the final determination in the eminent domain proceedings had been adjudged by due process of law not only not to exist, but incapable of being lawfully created out of the then existing state of things.

Statutes which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty or attach a new disability in respect of transactions or considerations already past should be deemed retrospective and void. *People* v. *Supervisors, etc.*, 4 Barb. 64; *Salters* v. *Tobias*, 3 Paige, 338; *Koshkonong* v. *Burton*, 104 U. S. 668; *Westervelt* v. *Gregg*, 12 N. Y. 202.

A statute which operates to annul or set aside a judgment of a court of competent jurisdiction and to disturb or defeat rights thus vested is void, and the rule holds good where the matter or thing concerns the public. *Mills* v. *Charleston*, 29 Wis. 400.

However eminent may be the authority of the legislature, it is regulated in its exercise by these well-settled principles of law, common to the whole state and the people whose sovereignty is supreme. The case here is not like those in which it has been held, and properly too, that the legislature may enact remedial laws, whereby new remedies for existing rights are created, where no vested rights are impaired. It is not competent for the legislature to adjudicate in a particular case, prescribe a rule contrary to the general law and order its enforcement, and so, if it shall be claimed that the act of May 21, 1890, assumes the existence of a claim in favor of the relator against the city, which in fact appears to be the inference from the language used, the act is void as an attempt on the part of the legislature to create a claim condemned by the law.

In his opinion hereinbefore referred to and which was

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adopted as the law of the case by our General Term on appeal from the order denying the motion of the city for a stay of proceedings, Judge BECKWITH says there is no moral reason why the relator should not be made good for any loss she has sustained for a public object, and that whatever technical objections may be raised in a court of law, there is no moral or legal argument that ought to prevent the legislature from providing for all that justice requires in her case, and that there is no doubt of the power of the legislature to require the city to make her just compensation for the damage she sustained, and the learned judge cites as authorities for these propositions the cases of *Town of Guilford* v. *Supervisors*, 13 N. Y. 143; *Sinton* v. *Ashbury*, 41 Cal. 530; *Borough of Dunmore's Appeal*, 52 Penn. St. 374; *People* v. *Flagg*, 46 N. Y. 401.

The story of the case of *Guilford* v. *Supervisors* is as follows: In 1838, three residents of the town of Guilford, in Chenango county, named Cornell, Clark and Humphrey, were elected commissioners of highways of the town. It does not appear what became of Humphrey, and it is not important to ascertain for our purposes. It was claimed by the town of Guilford that at some time prior to October, 1838, "The Butternuts and Oxford Turnpike Company had wrongfully taken possession of a public highway and bridge located within the town. The town, at one of its meetings, directed or authorized Cornell and Clark to sue the turnpike company for its alleged wrongful act in taking possession of the bridge. The suit was prosecuted by Cornell and Clark as such highway commissioners, and they were finally beaten on the ground that the suit should have been brought in the name of the town, instead of in their names as commissioners, and they were compelled to pay out of their own pockets, the costs and expenses of the litigation. The town then refused to reimburse them for these costs and expenses. Thereupon Cornell and Clark sued the town, and were beaten on the ground that the town as such had no authority in law to authorize the suit against the turnpike company as it was prosecuted (*i. e.*, in the names of

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Cornell and Clark as commissioners), and consequently no legal liability on the part of the town had been incurred. Cornell and Clark then procured the passage of a statute by the legislature providing that the question of their reimbursement should be submitted to the electors of the town, and that their decision should be final. The electors rejected the claim, and thereafter the legislature repealed the above-mentioned statute and enacted another statute requiring the county judge of Chenango county to appoint three commissioners, whose duty it should be to take proof and determine the amount of costs and expenses that had been incurred by Cornell and Clark in the suit against the turnpike company, and requiring the board of supervisors of Chenango county to proceed to collect the amount by levying the same upon the taxable property of the town, for the benefit of Cornell and Clark. The town of Guilford then commenced an action against Cornell and Clark and the board of supervisors to restrain the levying and collecting of the tax. These facts appeared by the answer of Cornell and Clark, to which the town demurred. The board of supervisors did not answer at all. It was finally held, and properly too, that the statute requiring the repayment to Cornell and Clark of the moneys expended by them at the request and for the benefit of the town in the turnpike suit was constitutional; that the town was morally and equitably liable to Cornell and Clark for the repayment of the moneys expended by them, and further, that the action as brought in the name of the town to restrain the imposition and collection of the tax would not lie as the corporate property of the town would not be affected.

The Supreme Court, when the case was before it at General Term, said: "The equity of the claim of Cornell and Clark was not considered by the court and for the reason that the question presented was one of strict law depending entirely whether authority to sue had been conferred upon them by statute and the court held it was not, and here its functions ended. They had no authority to go further and inquire whether in consequence of a mutual mistake between the

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electors of the town and Cornell and Clark, the town ought not to pay the costs growing out of it. The judgment of the court has not been interfered with. It is entirely competent for the state to assume and provide for a debt which it is not bound in law to pay, whether decided so or not and to apportion it upon its territory to which it is justly chargeable."

The claim of Cornell and Clark, it will be seen, was just and valid, and its rejection by the town was evidence of bad faith toward them. That case is not analagous to the one before us, because in that case, the town was equitably bound to make good the expense it had authorized to be incurred. In the case before us the claim is one condemned by the law.

The case of *People* v. *Flagg* decides, that the power of the legislature of the state to impose taxes upon its citizens, and to dispose of public moneys, is absolute and supreme within its legitimate sphere. But neither of the cases cited, nor any other that I have been able to find, holds that where a private individual prefers a claim which both law and equity holds to be invalid, and uncollectible, and such claim is rejected, the legislature may step in and by statute enforce its acknowledgment and collection. Moreover, conceding the power of the legislature to appropriate public moneys to objects of charity and for all manner of purposes deemed beneficial to the whole people of the state, it cannot, in my opinion, raise the moneys for such appropriations by a tax upon any one class of citizens as distinguished from other owners of taxable property in the city, for the sole benefit of another individual or class, to satisfy claims not only not recognized as valid, but condemned by the law of the land, and that is precisely what the act of May 21, 1890, seeks to do. The claim of the relator is not one legally or equitably arising out of the opening of Elmwood avenue. The statute attempts to make it one, and by providing that the tax necessary to meet and satisfy it shall be levied upon the property deemed benefited by the opening of Elmwood avenue. Such would be class legislation in the offensive sense of the term, and is condemned by the letter and spirit of our laws. Fur-

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ther still, the act of May 21, 1890, if enforced, certainly destroyed the contract between the parties of July 28, 1887, and that is not permissible to the legislature. If the legislative power contended for by the relator exists, then at any time after a municipal corporation may have paid its creditor for property or services all that it agreed to pay, and after it had in good faith performed its contract in that behalf without any claim of fraud or mistake and without questioning the integrity of the contract which has been performed, the legislature may by statue compel the payment of more, if in the opinion of a special tribunal created by the same statute for the purpose of determining the question, the creditor received an inadequate price for his property or services under and by virtue of his contract. In my judgment no such principle has ever found or will ever find lodgment as a rule of law in the jurisprudence of this state. The disposition of parties to disregard, repudiate or violate contracts when entered into with all the solemnity known to the law, and after enjoying the fruits thereof, should not be encouraged by the courts even as against a municipal corporation.

This is an appeal from the order and judgment entered on September 26, 1892, which in substance commands the common council of the city of Buffalo to recognize the claim of the relator as valid and to proceed with its collection and payment over as required by the act of May 21, 1890. There is no notice of appeal from the order which in form confirms the report of the commissioners appointed under the act of 1890.

The question must now be met as to whether we are at liberty to consider and dispose of the matter upon its merits, as to the validity of the statute or the claim made by the relator under it, in the absence of an appeal from the final determination of the court in confirming the report of the commissioners on February 10, 1891. If the statute and the claim are valid, that determination is in effect a judgment, which can only be reviewed by an appeal, or motion to vacate it. But, if, as it seems to me is the case, the statute was void for the reasons herein given, all proceedings under it were

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and are likewise void, because the modes of judicial procedure prescribed by law for the prosecution of a right or for the redress of a wrong are not applicable to such a case. The statute, the claim, and the proceedings which have been had upon them are unique, and are governed only by the terms of the statute itself.

Without elaborating or discussing authorities for this contention, it must be sufficient to say that where a party is compelled to appeal to the courts for active and affirmative assistance to enforce by the infliction of punishment, if found necessary, the acknowledgment and payment of a claim condemned by law but which the legislature has attempted to create by statute, the court should refuse such assistance, even if by reason of the inadvertence or mistake of the parties the strict forms prescribed by law and practice for reviewing judical decisions have not been complied with.

The order and judgment of September 26, 1892, should be reversed, with costs.

Order affirmed.

Moore *v.* New York Central, etc., R. Co.

(Buffalo Superior Court — General Term, December, 1892.)

In an action to recover for injuries received by being struck by a passing railroad train at a street crossing, the evidence for plaintiff tended to show that the train was being run at a rapid rate of speed; that no warning of any kind was given of the approach of the train; that the crossing was in a populous part of a city which was much traveled and that the night was quite dark. Plaintiff and his companion were in a one-horse carriage the sides of which were closed with curtains somewhat obstructing their view in those directions. At the crossing, which they approached from the east there were five tracks, the two westerly ones belonging to defendant; and as they approached the first track going west they stopped their horse, looked up and down the tracks and seeing nothing to prevent their crossing the remaining tracks in safety, made haste to cross and were struck and injured on the last track of defendant's road by a passing train. It also appeared, that the view to the north along the tracks for a long distance from a point about one hundred and fifty feet east of them was unobstructed except as to

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an electric light near the crossing which it was claimed might have affected the view to some extent, and it was from that direction that the train came which caused the injury to plaintiff. *Held*, that whether defendant exercised due care in the running of the train was properly submitted to the jury.

Defendant proved that no flagman or other person to give warning was kept at the crossing. *Held*, that it could not complain of a charge that the absence of such a person was a circumstance which the jury might consider in determining whether or not defendant operates the train with due care.

While the duty of one crossing a railroad track to look and listen is a continuous one, he is bound to exercise ordinary sense, prudence and capacity and to use his eyes and ears so far as he has opportunity, the circumstances and actual condition of things at the time must be considered in measuring the opportunity.

Evidence considered and *held*, that plaintiff could not be said to have been negligent as matter of law.

APPEAL by defendant from a judgment entered upon the verdict of a jury against it, and from an order denying a motion for a new trial.

James F. Gluck, for defendant (appellant).

John Cunneen, for plaintiff (respondent).

WHITE, J. On the 5th of November, 1889, the plaintiff, with a companion named John Hughes, left East Buffalo about seven o'clock in the evening to come to their homes in the city, in a one horse carriage. The sides of the carriage were closed with curtains, which to some extent obstructed their view in those directions. Their route lay along Eagle street, which is crossed by the tracks of the defendant's railroad and by those of the Lake Shore and Michigan Southern railroad, the defendant having two and the Lake Shore three tracks across the street at that point. The tracks of the defendant are west of those of the Lake Shore. These five sets of tracks and the distance between them, covered a space of about seventy feet on Eagle street, and they cross the street practically at right angles. The view to the north, along the tracks for a long distance from a point about 150 feet east of them was unobstructed, except as to an electric light near the

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crossing, which, it is claimed, may have affected it to some extent, and it was from that direction that the train came which caused the injury complained of. As the plaintiff and his companion approached the crossing, this electric light and the structure to which it was affixed was for an indefinite space of time between them and the coming train. When on or within a few feet of the easterly, or first track to be crossed by them, as claimed by the plaintiff and Hughes, they stopped their horse and leaned forward and looked up and down the track and discovered nothing to prevent their crossing the remaining tracks with safety, whereupon they made haste to cross, and were struck and injured on the second of the defendant's tracks.

The evidence on the part of the plaintiff tended to prove that the train in question, at the time of the accident, was being run at a rapid rate of speed, at least twenty-five miles an hour, according to the estimate of one of the witnesses. Evidence was also given tending to prove that no warning of any kind was given of the approach of the train; that the crossing was in a populous part of the city and that that part of Eagle street is much traveled. The defendant was bound to exercise such reasonable precaution in the running of its trains as ordinary prudence dictated to protect travellers along the street from injury, and the question whether it in fact exercised due care on this occasion was properly left to the jury. Negligence on the part of the defendant is conclusively established by the verdict. *Thompson* v. *New York, etc., R. Co.*, 110 N. Y. 636; *Swift* v. *Staten Island, etc., R. Co.*, 123 id. 645. If it be true, as claimed by the plaintiff, that as he approached the first tracks he did exercise due care to ascertain whether or not it was safe to cross, and having satisfied himself that it was, he was in duty bound to do just what he claims to have done, that is to hasten across to a place of safety.

The trial judge instructed the jury that the defendant was not charged by law with the duty of having a flagman or person to give warning of approaching trains at this crossing, and that the absence of such a person was a circumstance which

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they might consider in determining whether or not the defendant operated the train with due care. To this part of the charge the defendant excepted, and in the same connection requested the court to charge, that as the plaintiff knew no flagman was kept at this crossing he did not look for one, and that the presence or absence of a flagman in this case on this occasion would be immaterial. The court refused and the defendant excepted to the refusal.

As to the exception to the charge it may be said that although the defendant was bound by law neither to ring its bell, blow its whistle, or keep a flagman at this crossing, yet it was bound to give some notice and warning of the approach of this train and what notice or warning was sufficient was a question for the jury. Proof of the facts as to what precautions were taken was necessary to enable the jury to determine the question. The fact that no flagman or other person to give warning was kept at this crossing was proven by defendant itself and, therefore, it cannot complain of its consideration by the jury.

As to the request to charge, the sense of it is that because the plaintiff knew no flagman was regularly stationed at this crossing his conduct would not have been affected or influenced by the presence of one on this occasion, if one had been present.

The effect which the presence of a flagman might have had upon the conduct of the plaintiff if proper for consideration at all, was for the jury and not for the court.

The charge of the court as to the right of the jury to consider the speed of the train; as to the degree of care incumbent upon the defendant in its management, and as to whether or not the train was late on this occasion, is criticised and excepted to by the defendant's counsel, but we are unable to discover any substantial error in the charge in any of these respects.

The speed of the train and whether any warning of its approach was given, were questions not only proper but necessary to be answered by the jury in determining whether or not the defendant was guilty of negligence.

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It was the duty of the defendant to give suitable warning of the approach of this train and to so regulate its speed as to apprise the plaintiff of its approach in time to enable him to avoid injury, and the question as to whether defendant exercised the degree of care required of it on this occasion was, as we think, fairly submitted to the jury.

The counsel for the defendant excepted to the refusal of the court to charge specifically: "that if the jury believe that they" (Moore and Hughes) "did not look from the time they struck the Lake Shore track until they got struck, although they had an opportunity of looking, and seeing the train if they had looked, then they must find that the plaintiff was guilty of negligence."

Upon this subject the court had already charged the jury very fully to the effect that the law imposed upon the plaintiff the duty of listening, and looking both ways as he approached this crossing and that if he could by the exercise of those precautions have discovered the approach of this train in time to have avoided the injury he could not recover, and its refusal to repeat the charge was proper. *Raymond* v. *Richmond*, 88 N. Y. 671.

An exception was also taken by the defendants to the refusal of the court to charge that the evidence in the case is undisputed that the horse ran into the train and caused the injury complained of. It is hardly worth while to discuss this question at length, because it is impossible that, as the evidence tended to show, after the accident, one of the wheels of the buggy could have been found on the front of the engine, and the buggy have been all smashed to pieces and the horse have had one leg cut off, and that the remains of the buggy could have been found west of the track on which the accident occurred, as the result of an attempt by the plaintiff's horse to get through or over the train while it was running at the rate of twenty-five miles an hour. We think the jury was alone competent to decide the precise or probable cause of the accident, and that their finding upon that question must stand.

The serious contention on the part of the defendant is that

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the plaintiff should be held to have been guilty of contributory negligence, notwithstanding his testimony that he looked and listened, on the theory that if he had looked he must have discovered the danger in time to have avoided it; undoubtedly the duty of looking and listening is a continuous one while crossing a railroad track, and a person so crossing is bound to exercise ordinary sense, prudence and capacity, and to use his eyes and ears so far as he has opportunity, but the circumstances and actual condition of things at the time must be considered in measuring the opportunity. It is urged that because the plaintiff and his companion testified that as they approached this crossing they saw smoke ascending towards the heavens several hundred feet away in the direction of the city, they must have been able to see a like distance up and down the railroad tracks and that the night, and the absence of obstruction must have been such as would have enabled them to avoid this accident if they had exercised due care.

When it is remembered that the evening of this accident may have been quite dark; that the view to the north may have been somewhat obstructed by the electric light near the crossing, and its effect upon surrounding objects; that the train which caused the injury may have been drawing to the point of collision at the rate of forty feet or more in each second of time, and that the mind of the plaintiff may not have operated with that rapidity which seems to have been sometimes assumed as necessary in such cases, we cannot, as matter of law, attribute negligence to the plaintiff. While diligence to discover danger in such case may reasonably be required, no absolute, iron-ribbed standard of intelligence or foresight has yet been adopted by the courts as applicable to all men, under all circumstances. We do not deem the *Werinowski* case an authority against the plaintiff. The facts in that case were noticeably different from those in this one. Among other things, it appeared in that case, that there was absolutely no obstruction to the vision. In this case, the electric light and its effect upon surrounding objects may have obstructed the view to the north to some extent. In that case,

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there was no evidence that the person injured looked or listened, or took any precaution whatever to avoid danger. In this case, the plaintiff did look and listen as he reached the crossing, and he appears to have taken all the precaution required of him. In that case, the train or engine and tender were moving at the rate of four miles an hour. In this case the train was moving at the rate of twenty-five miles an hour. In that case, the party injured was on foot, with nothing to do but look and listen. In this case, the plaintiff was compelled to pay some attention to the management of his horse. To hold that the plaintiff was bound to take separate and independent observations on his approach to each succeeding railroad track, after or while passing over the preceding one, before proceeding, would involve a proposition which, it seems to us, no court will care to announce as a rule of law. The jury was justified in finding that the plaintiff took care, with all his senses and all his powers, and was as sure as he might be from sight and hearing when he arrived at the crossing that it was prudent to cross, and that he then started to hasten over, as the law required him to. No reversible error is disclosed by the record, and therefore, the judgment and order appealed from should be affirmed, with costs.

Titus, Ch. J., concurs. Hatch, J., not sitting.

Hughes v. New York Central, etc., R. Co.

(Buffalo Superior Court—General Term, December, 1892.)

Appeal by defendant from a judgment entered upon the verdict of a jury against it, and from an order denying a motion for a new trial.

James F. Gluck, for defendant (appellant).

John Cunneen, for plaintiff (respondent).

White, J. The facts in this case are substantially the same as those in the case of Daniel W. Moore against the same

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defendant, the plaintiff having been injured by the same accident, and it is agreed by the parties that the decision in that case shall govern this one, and so the judgment and order appealed from should be affirmed, with costs.

WILLIAMS *v.* NEW YORK, ETC., R. CO.

(Buffalo Superior Court—General Term, December, 1892.)

Plaintiff and a fellow workman were directed by their and defendant's foreman to remove the center plates from an unfinished platform car. Each without aid or consultation with the other obtained a jack and placed it under an end of the car. Plaintiff had never used a jack before. After the platform was raised from four to six inches above the trucks, but not high enough to have the center pin clear the plates, plaintiff looked at both jacks which appeared secure and then went under the car to raise the center pin, and while there, and before he could escape, was injured by the car falling. As the car fell it swerved, and gave way where the fellow workman's jack was placed. This jack was not a sound and safe tool, for the purpose required. *Held*, that as from all the evidence and the circumstances a jury would be warranted in drawing the inference, that the falling of the car was due to the defective jack, a nonsuit was error.

Plaintiff's act in going under the car simply to raise the center pin, was not in the circumstances so apparently dangerous as to be negligence *per se*.

A witness testified that before and after plaintiff was injured, he had informed the foreman that the jacks were not fit for use. *Held*, that whether defendant had notice of their condition was for the jury.

Whether the fellow workman ought to have or did discover the defect in the jack, *i. e.*, that the nut was worn, it was alone his negligence, and defendant was still negligent in furnishing an unsound tool, and the accident being occasioned by the concurrent negligence of the master and a fellow servant, the master was not excused.

APPEAL from a judgment and order denying plaintiff's motion to set aside a nonsuit.

George W. Cothran, for plaintiff (appellant).

Sprague, Morey, Sprague & Brownell, for defendant (respondent).

HATCH, J. Upon the evidence given I am persuaded that plaintiff was entitled to have his case submitted to the jury.

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It appeared that he was employed by defendant as a car repairer, working in and about defendant's repair shop and yards in this city. He entered such employment on October 1, 1888, and continued therein until the thirteenth of the same month, when he received the injuries for which this suit is brought. On the last named day, he and one Zimmer were directed by the foreman to jack up a new unfinished platform car and remove therefrom the center plates that connected the body of the car with the trucks. Plaintiff had never before jacked up a car, but had seen jacks and knew their use. There were a number of jacks about the repair shops, furnished by defendant, some of which were single screw jacks and some with double screws, worked with a lever. Upon the direction being given, plaintiff found a single screw jack, which he placed under the north side of the car, while Zimmer procured a double screw jack, which he placed under the south side of the car. Plaintiff did not see, and had never examined the jack procured by Zimmer, nor had he before that time any occasion to examine or use them. When the jacks were placed in position the car was raised from four to six inches above the trucks, but not sufficiently for to have the center pin, which entered a socket about twelve inches, clear the plates; this could be accomplished by raising the body still higher with the jacks or by going under the car and raising the pin by hand; the latter course was adopted. Zimmer was to draw out the trucks of the car while plaintiff raised the pin. Before the latter went under the car, he looked at his jack, found it was secure, then looked at Zimmer's jack, which appeared secure, and then went under the car. As he raised the pin he felt a sudden jar, the body of the car swayed to the south, plaintiff tried to escape, but was caught between the pin and the side of the car-wheel, where he was pinioned by the neck, receiving serious and permanent injuries, for which he now seeks compensation.

The allegations of negligence upon the part of defendant consist in not furnishing a safe and secure jack for the use designed. It is needless to cite authority in support of the

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doctrine that a master is bound to furnish safe, suitable and sound tools for the performance of his work, and to keep them in repair, in and about which duty he is required to exercise reasonable care and prudence. Applying the facts to this rule, we find that the evidence tends to establish that the jack which was procured by Zimmer was not a sound tool and safe for the purpose required. Upon this point the testimony of the witness was to the effect that one of the screws of the jack used by Zimmer had fallen into the cylinder, and laid upon the ground by the side of the car, immediately following the accident; that a perfect screw could not fall into the cylinder without the application of power, either by the lever, if a weight rested upon it, or by the hand turning it, if there were no weight. It also appeared that many of the jacks in use about the shop had become worn, and wobbled in their sockets; that this indicated a wearing of the screw, and a consequent loss of power. Independent of the oral proof, the jury were also entitled to consider, as bearing upon the cause of the accident, the action of the car, the fact that when it fell it swerved towards the south, that the giving way was where the claimed defective jack was placed. All of this testimony, and the circumstances of the accident, would warrant the jury in drawing the inference that the falling of the car was due to a defect in the jack. It is insisted, however, that if this be true, that there is no evidence to show that the master was informed of the condition of the tool, or had been guilty of any lack of care in providing a safe implement. This contention is not borne out by the fact, for the witness Wolfe, who worked at the same place for defendant, both before and after plaintiff was injured, testified that he informed the foreman of defendant that the jacks would not work properly, and were not fit for use. Notice of this character was notice to defendant, at least, it was evidence from which the jury would have been authorized to find that notice had been given. *Mann* v. *Del. & Hudson Canal Co.*, 91 N. Y. 495; *Harvey* v. *New York Central, etc., R. Co.*, 19 Hun, 556.

It is further insisted that the plaintiff had the same means

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of knowledge of the defect, or of informing himself of it, as the defendant had. This, however, is not borne out by the testimony, for it affirmatively appeared that plaintiff had only been at work thirteen days, and during that time had not had occasion to use a jack, and in fact had not before used one; besides, from a description of the jack, it is apparent that if the nut was worn, it could not be detected by a casual inspection, and might not by anyone not accustomed to their use, even though examination be had, as a portion was hidden from view. Objection is also urged that if there be any negligence it was that of a co-employee, of which plaintiff took the risk. If we assume that Zimmer was negligent, in making use of a defective jack, the defendant is not aided. As we have seen, Zimmer selected the jack alone, without aid or consultation with plaintiff, consequently, if he ought to have, or did discover its defect, nevertheless it was alone his negligence, and such fact in no wise detracted from the duty of defendant; it was still negligent in furnishing the unsound tool, so that it becomes the concurrent negligence of both. Under such circumstances, the master is not excused. *Coppins* v. *New York Central, etc., R. Co.*, 122 N. Y. 557.

Defendant urges that the evidence conclusively establishes contributory negligence upon the part of plaintiff. This was clearly not the opinion of the learned trial court, as it announced that the evidence upon that branch of the case was sufficient to submit to the jury. I see no reason for disagreeing with that conclusion. The main features upon which this claim is urged, have been already noticed; the only additional one relates to his going under the car, when it might have been raised sufficiently high by the jacks, to obviate the necessity, and also by a failure to use other supports for the body of the car than the jacks. It appears that the wooden horses used for support could not be placed under the body, until the trucks were removed, and the car fell before they were taken out. Taking all the circumstances into consideration, I am not able to say, as matter of law, that the act of going under the car, simply to raise the pin, was so apparently

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dangerous as to be characterized as negligence *per se*; it is doubtless competent for the jury so to find, but it is a question for them.

Error was also committed in rejecting offered testimony, and in striking out that which had been given, but as this will doubtless be avoided upon a new trial, it is not deemed necessary to discuss it.

I am, therefore, of opinion that the judgment and order appealed from should be reversed, the nonsuit set aside, and a new trial ordered, with costs to abide the event.

Judgment reversed, new trial ordered, costs to abide event.

KEENAN *v.* NEW YORK, ETC., R. CO.

(Buffalo Superior Court — General Term, December, 1892.)

Plaintiff's intestate with knowledge that a certain track in defendant's yard, where he was employed as a car repairer, was used exclusively for storing crippled cars awaiting repairs, went under a car on said track and while disconnecting a spring required by him, another car was shunted against the one from which he was taking the spring with such violence as to force it over his body, causing injuries. *Held*, that defendant was not liable.

The fact that plaintiff's intestate was directed to go where he did by a foreman, cannot avail in the absence of evidence justifying a conclusion, that the foreman had authority to change the regulations of defendant as to where plaintiff's intestate should work.

THIS is an appeal by the defendant from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial.

E. C. Sprague, for defendant (appellant).

George W. Cothran, for plaintiff (respondent).

WHITE, J. In August, 1889, the plaintiff's intestate was employed by the defendant as a car repairer in its yards in

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Buffalo. Three tracks ran parallel and contiguous to each other in those yards; one of them known as No. 8, was used exclusively for storing crippled cars until such time as the workmen were ready to repair them, when they were transferred from track No. 8, to one of the other two tracks, which were known as Nos. 2 and 21, and the two last named, were the only tracks on which any work in the way of repairs was done. Track No. 8, was open only at its easterly end and crippled cars were being continuously thrown in upon and taken from that track, without notice or warning being given to any one, and no precautions were taken by the defendant to prevent accidents of the character of the one in question. From five to nine hundred men were employed in the yards. Workmen on tracks No. 2 and 21 protected themselves by flags, and no cars were moved on either of these tracks without notice to the workmen engaged in repairing cars upon them. Robert Gunn was the superintendent in charge and control of all the business in the yards and he had an assistant named O'Day. The workmen were divided into gangs with a foreman for each gang, who superintended their work, and Thomas Tracy was the foreman of the gang in which deceased was at work. While deceased was engaged in repairing a car on track No. 2, he had occasion to use a bumper spring in making repairs on such car. He had been instructed to apply to one of his fellow servants, named John Goetz, when in need of material for repairs, and it was Goetz's duty to procure such material from the supplies in the yards. Deceased applied to Goetz for this spring which he needed and was informed by him that the defendant had none on hand. Thereupon deceased informed his foreman Tracy, that he needed the spring, and it may be assumed that Tracy directed him to take one from a crippled car which was then stored on track No. 8, awaiting its turn to be placed on one of the other tracks itself for repairs. While the deceased was under that crippled car, engaged in the act of disconnecting the spring required by him, another car was shunted or thrown in upon track No. 8, against the one from which he was taking the

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spring, with such violence as to force it over his body, causing the injury complained of. The deceased was familiar with the use made of track No. 8 and with the way in which crippled cars were moved upon and off from it.

The whole duty of the defendant to the deceased required it (1) to furnish him a safe place in which to perform his work, (2) to supply him with suitable implements and appliances with which to work, (3) to furnish competent co-servants, and (4) to provide suitable and proper rules and regulations for the guidance of him and his fellow servants in the performance of their tasks. No well founded claim can be made that the defendant was derelict in its duty towards the deceased in any of these respects, unless it is chargeable with the consequences of the act of the deceased in placing himself under the car on track No. 8, which ran over and injured him, without protection of any kind against injury, which was liable to and did in fact result from the manner in which the crippled cars were handled on track No. 8.

It seems not to have been contemplated or intended by the defendant that any of its servants should at any time do any work of any kind on track No. 8, except to store cars thereon and remove them therefrom, but that the track should be, as it was, used exclusively for the storage of crippled cars while awaiting their turn for repairs. The statement of the case makes it apparent at once that this was the reason why no precautions were taken as to car repairers with reference to that track, and it must be conceded that the deceased knew it as well as the defendant. If, then, it was not a place provided nor intended for its workmen by the defendant, and they knew it, it is difficult to see how the defendant can be charged with violating its duty by one voluntarily going there to work. No rule or regulation of the defendant required it; but on the contrary, its rules required that track No. 8 be used exclusively for the storage of crippled cars. A master cannot be held responsible for an injury to his servant, sustained in a place not contemplated, provided or designated by him, no matter through whose negligence, on the ground that he has

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failed to furnish a safe place in which the servant is to do his work. In such a case the place is selected by the servant and not by the master. The contention that in requiring the deceased to go to work where he was injured, Tracy, his foreman, was discharging the duty of the master, cannot prevail, for the reason that there is nothing in the evidence justifying the conclusion that Tracy was vested with any authority to change or in any manner interfere with the rules and regulations of the defendant as to the places in which the deceased and his fellow servants were to do their work, and, as we have said before, those rules and regulations provided that all work should be done on tracks 2 and 21, and none on track No. 8. That those rules and regulations were sufficient is conceded for the purposes of this case, because the trial judge so charged the jury, and no exception was taken thereto.

In our opinion no recovery by the plaintiffs can be sustained on the record as it is before us. The fact is not only undisputed, but affirmatively testified to by the deceased himself, while living, that he knew of the use made of track No. 8, and the manner in which crippled cars were handled upon that track. No claim is made that the injury complained of was caused by reason of any variance or departure on the part of the defendant from the methods usually employed in doing business, nor by reason of any variance or departure by authority of the defendant from the rules and regulations made for the government of the deceased and his fellow servants, which are conceded to have been sufficient.

The case, therefore, falls within the well-settled rule that when a servant is as well informed as the master concerning the dangerous character of the work and voluntarily proceeds with it, he cannot hold the master responsible for the consequences.

These views necessitate a reversal of the judgment without reference to the question as to what effect, if any, the death of Keenan, as shown by the record, may, or ought to have upon the verdict of the jury, which question we do not deem it necessary to consider or decide.

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The judgment and order appealed from should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed, new trial ordered costs to abide event.

Hurd *v.* Newbrook.

(Buffalo Superior Court—General Term, February, 1893.)

Before plaintiffs would deliver lumber to W., who was under contract to build a house for defendant's son, they had a bill of it made out and submitted it to defendant, who approved of it and agreed to see it paid. *Held*, that a subsequent delivery of the lumber to W., was a sufficient consideration for defendant's guaranty.

Defendant agreed to pay the bill according to the terms of the contract, which provided that the last payment should be due on the completion. The contractor abandoned the work and it was completed by the owner. *Held*, that on completion of the contract, no matter by whom, defendant became liable.

Appeal by plaintiff from a judgment dismissing his complaint.

Howard & Clark, for plaintiffs (appellants).

Lewis, Moot & Lewis, for defendant (respondent).

Titus, Ch. J. This action was brought in the Municipal Court to recover against the defendant for a bill of lumber furnished to one Abram Walty on a guaranty of payment. It appears that on the twenty-third day of July, 1891, William G. Newbrook, son of defendant George Newbrook, contracted with Abram Walty to build him a house, according to certain plans and specifications contained in a contract, the work and material to be furnished by Walty. It was agreed that Walty should receive $1,450 for the job, $500 when one-third of the work was done, and $500 more when two-thirds of the work was done, and $450 to be paid to said Walty when the house was completed and ready for occupancy. Some days after the date of this contract the plaintiffs made out a bill of lumber necessary to build the house and presented the same to

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George Newbrook for his approval and guaranty. The defendant wrote upon the bill the following: "I approve of the following bill amounting to $460 and agree to see it paid according to the terms of payment agreed to in the building contract. (Signed) George Newbrook, July 29, 1891." Thereupon the plaintiffs furnished to Walty the necessary materials for building the house. On the nineteenth of October, and before Walty had completed his job according to his contract, he absconded, leaving the building unfinished and without having paid the plaintiffs the full amout of their bill. William G. Newbrook, the owner, then proceeded to complete the house, at a cost of $275.42. There still remained, at the time of the commencement of this action, unpaid on the plaintiff's bill $119.02. It is not quite clear from the evidence given on the trial how the account between Walty and William G. Newbrook stands. He testifies that Walty abandoned his contract about the twentieth of October and that $1,080.60 was paid to him up to the nineteenth of October. Then, he says, the balance of the plaintiffs' bill was $160 at that time; that he accepted the different liens and orders, and above that he had $242.40. The accepted orders were $65 for hardware and two liens for $53.58 and $75.20, respectively. Then, after completing the house for $275, he paid the plaintiffs $40.98 on their bill, which made the amount of the contract price, namely, $1,450. It is not stated anywhere in the case that the $1,080.60 paid to Walty includes the two payments to the plaintiff, but it probably does include the $300 paid them, as they received that amount before the date of his abandoning the contract, although they claim to have received it in checks from Mr. Newbrook. On his cross-examination, the witness was asked by the defendant's counsel: "Leaving the liens out of the question, how much money has been paid out, first and last, on that house, all of it?" and the answer was, "$1,450." This is exclusive of the two liens which amount to $128.83.

The validity of the liens and the amount unpaid to Walty, in the view which I have taken of this case, cannot be of

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much importance. The liens can only be enforced to the extent of any unpaid balance due the contractor, and it is apparent that at the time of filing the liens the contractor had been overpaid. It thus appears that William G. Newbrook has paid the whole contract price for building his house, leaving the $119.02 of the plaintiffs' claim unpaid. But I do not think the question is to be determined either from the fact that the contract price has been paid or of the failure of Walty to complete the work according to the terms of the contract. It is claimed that the guaranty was without consideration and cannot be enforced against the defendant. I think the delivery of the lumber was a sufficient consideration for the guaranty. Before the plaintiffs would deliver the lumber they had a bill of it made out and submitted to the defendant for approval. On his approving and agreeing to see that it would be paid, the lumber was delivered to the contractor, on the faith of the guaranty. Under the authorities it was a sufficient consideration to uphold the undertaking of the defendant. *Beakes* v. *Da Cunha*, 126 N. Y. 293.

According to the contract of guaranty the defendant agreed to see the amount of the bill paid according to the terms of the contract, and it is necessary to examine the contract to determine how the payments were to be made. It appears that $500 was to be paid when the work was one-third completed and $500 more when two-thirds of the work was done and $450 was to be retained by Newbrook until the work was finally completed, so that when the house was completed the whole amount became due. It is claimed that because the contractor, Walty, did not complete the work, but abandoned the same, and Newbrook was obliged to complete it, that there was no compliance with the terms of the contract and hence nothing became due on the last payment. I do not think such a construction of the contract of guaranty is either just or tenable. The plaintiffs were not a party to the contract with Walty. It was no concern of theirs that the work was not well or completely done, and a failure of a contractor to carry out his contract cannot operate to deprive the plaintiffs of

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their remedy on the guaranty. We resort to the contract only to determine or to ascertain the terms of payment and they are to be construed as a part of the guaranty for that purpose. It does not create a condition precedent to the right of the plaintiff to maintain the action against the surety. It simply fixes the terms of payment and the time within which it is to be made, so that when the work was done, no matter who completes it, the surety becomes liable. Any other construction would put it in the power of the contracting parties to defeat any person who might furnish material relying upon a guaranty for payment. Evidently the defendant was interested in giving the contractor Walty credit with the plaintiffs that he might go on and build the house for his son.

The lumber was furnished by the plaintiffs, relying upon the assurance expressed in the writing of the defendant that Walty would pay, or in default thereof that he would pay the amount of their bill. The contract of guaranty construed with the undertaking of Walty is a complete and perfect contract, fulfilling all of the essential requirements of the cases cited by the counsel for the defendant. Since the amendment to the Revised Statutes in 1863 it is not necessary to express a consideration in the instrument guaranteeing against the default of another, and the cases cited upon that question are not in point here.

The judgment should, therefore, be reversed with costs.

Hatch, J. (concurring). I concur in the result reached by Titus, Ch. J., upon the ground that the guaranty, in this case, is to be construed as referring to the building contract to determine the time when payments fell due and for no other purpose. And, as it appears, the contract was finished to the extent of entitling Walty to two payments, it then became the right of plaintiffs, under the guaranty, to demand pay thereon, and that upon the proof here, without reference to the subsequent acts of Walty; for, if all the damage occasioned by Walty's breach of contract be deducted, there still remained and was paid to him a sum sufficient and more than sufficient

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to discharge plaintiff's debt. Under this construction, it is clear that a time came when Walty was entitled to demand a sum of money due upon the contract, exceeding the amount of plaintiffs' bill. When that moment arrived, defendant's guaranty attached and his contract then was to see plaintiffs paid. There is no hardship in this, for defendant then had it in his power to protect both himself and plaintiffs. He chose to permit payment to be made to Walty without seeing that it was properly applied and thereby assumed the risk of Walty's default. This construction was overlooked by the court below, and in consequence the judgment must be reversed with costs.

Judgment reversed.

TAYLOR *v.* KIRKOVER.

(Buffalo Superior Court — General Term, February, 1893.)

In an action for four months' rent tried before a referee, he found that defendant made an arrangement in the latter part of April with F., plaintiff's agent, to rent the premises from month to month subject to plaintiff's approval, and refused to find that defendant communicated the arrangement to plaintiff or that she assented thereto. The evidence of plaintiffs was to the effect, that in a conversation with her a few weeks prior to May first, defendant's wife had stated that they would like to retain the house at least six months longer; plaintiff said, that she was anxious to sell the house, but that if it was not sold they could stay. She also testified that before the conversation with defendant's wife she had written a letter to O., a former agent, who had refused as defendant testified to let him have the house for six months, in which she stated that defendant's wife had called the day before and said that they would not care to take the house for a year but would do so for six months if she would let them. This letter bore date March nineteenth.

One of plaintiff's daughters testified that the conversation between her mother and defendant's wife took place in the spring; her other daughter, that it took place in February or March. *Held*, that a finding of the referee that before May first, a contract of rental was made for six months, was against the weight of evidence, as the testimony showed that plaintiff understood that she had not leased, and defendant understood that he had not rented.

APPEAL from a judgment entered upon the report of a referee. The opinion states the case.

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Geo. T. Bardwell, for plaintiff (respondent).

John Cunneen, for defendant (appellant).

HATCH, J. The complaint herein, alleged that the plaintiff, prior to May 1, 1890, leased to the defendant certain premises, specifying them, for the term of six months from said May first, for and at the agreed price of $100 a month, payable on the first day of each month; that defendant took possession of and occupied said premises under this agreement, and has made default in payment for four months, whereby there became due and owing to plaintiff the sum of $400, with interest thereon from the several dates when payment fell due, for which sum, with interest, plaintiff demanded judgment. The answer is a specific denial of the complaint. Upon the trial, plaintiff gave evidence, which she now claims is sufficient to uphold a recovery under the allegations of the complaint. Upon a submission of the case, the referee found the agreement as alleged in the complaint, and ordered judgment for plaintiff, based thereon. At the close of the proof, plaintiff moved to amend her complaint, as stated, "to conform to proof, so that if the court finds that no agreement was made for the renting, either for six months or from month to month, the complaint shall allege a renting for a year from May 1, 1890."

This motion was denied, and the case disposed of, upon the theory of an agreement for a term of six months, and entry thereunder, as alleged in the complaint, and default made in payment. The plaintiff having tendered this issue, and the referee having ruled that there was none other in the case, this appeal is to be disposed of upon such theory, and none other. *Nealon* v. *Grand Trunk Railway*, 5 N. Y. St. Repr. 256; *McKecknie* v. *Ward*, 58 N. Y. 546; *Vail* v. *Long Island R. Co.*, 106 id. 283.

While it is true that it appears from the testimony, that defendant was in the prior occupation of the premises, under a written lease, yet it is equally true that when the written lease was offered in evidence, the defendant objected, upon

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the ground that it was irrelevant. The fact that the referee overruled the objection, and received the lease in evidence, cannot now be made the basis to uphold a recovery for rent, based upon a holding-over after the expiration of the term. First, for the reason that the complaint and referee's finding excludes any theory of holding-over after the expiration of the term; and second, the evidence was entirely irrelevant for that purpose. It was doubtless competent, as showing the relation of the parties, and the referee's findings show it to have been limited to that purpose, otherwise it would have been error to receive it, as it was not within the issue. This, therefore, removes from our consideration much of the argument of respondent's counsel, and leaves the disposition of this case to stand or fall, based upon a consideration of the testimony which furnished the ground of the finding.

It is barely possible, by indulging in some presumptions of doubtful propriety, to spell out enough from plaintiff's testimony to say that a contract of rental for six months was made. It is not essential, however, to pass upon this question in the view we take of the testimony. The burden of proof was upon plaintiff to establish, by a satisfactory preponderance of evidence and circumstances, a contract of rental as alleged in the complaint. Her proof upon that subject is found in the testimony of herself and two daughters, Mrs. Cornwell and Mrs. Bartlett, and is to this effect: That defendant was in the occupation of the premises at the time of the claimed contract, and had been for two years prior thereto. Plaintiff testified that she first proposed that defendant should continue in possession for another year; this was not accepted. A few weeks prior to May 1, 1890, defendant's wife called upon plaintiff and said: "They would like to retain the house for at least six months, and perhaps longer; that they would be away most of the summer, but that they would prefer keeping their furniture there. * * * I said to her that I was very anxious to sell the house, but that if it was not sold they could stay, and I would be very glad to have them." Mrs. Cornwell testified that she was present, in the spring of 1890, when Mrs.

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Kirkover called; was in an adjoining room and heard the conversation. Mrs. Kirkover said "she wanted the house for six months anyway, and perhaps longer. She said nothing about going away, but that is all I remember. I do not know what my mother said." Martha Bartlett testified that she was with her sister. Mrs. Kirkover said she came to see if "Mrs. Taylor would rent the house for six months longer. My mother said that if she did not sell it she would rent it for six months longer. Mrs. Kirkover said she would take it. I heard all of the conversation." On cross-examination, witness stated: "My mother did say that if she could not sell the house she would rent it. I can't remember whether or not my mother said she was very anxious to sell the house. I think she did say so, and that she would rent it if she did not sell." Witness was positive this conversation was in February or March.

Respondent makes no claim that there is further testimony to support the contract than such as is herein referred to.

Upon the part of defendant it was testified by Mrs. Kirkover that she was sent by the defendant, in February, 1890, to rent the house for six months from the first day of May, and wanted a definite answer at the time, and if plaintiff gave a favorable answer, to rent it; that in pursuance of it she called upon plaintiff, and told her she was sent by her husband "to see if she would let us have the house for six months, and if she would give us the answer then, that we would take it; Mrs. Taylor said that if she rented to anybody that she would be very glad to let us have it; that she did not wish to rent it for that length of time, as she preferred selling it." On cross-examination witness said: "I will not say that Mrs. Taylor did not say that if she did not sell she would be glad to have us stay." This witness informed defendant that plaintiff would not rent for six months.

William E. Otto, one of a firm of real estate dealers, who was employed by plaintiff at this time to rent the premises, testified that in the spring of 1890, he called upon plaintiff and that she informed him that she had seen defendant; that he did

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not wish to rent for a year; that witness then advised her not to rent for less than a year at that time, and that she then decided not to rent it for less than a year; that on the first of May, if not then rented, it might do to rent it for less than a a year than not at all. A sign "For Rent" was upon the premises at this time. Nothing was then said by plaintiff that she had rented to defendant. There was also a letter written by plaintiff to the witness' firm, bearing date March 19, 1890, introduced in evidence, in which plaintiff stated "that Mrs. Kirkover called here yesterday and said they would not care to take the house for a year, but would do so for six months, if I would let them. This would leave it without a tenant in the time of the year when it is least likely to rent. I heard of a party who wants a house in this vicinity for a term of years, and it may be our house might suit them. I shall know more about it in a day or two. In the meantime I trust you will do what you can to rent it." This letter was written in answer to a letter written by the agents the day before informing plaintiff that no reply had been received from Mr. Kirkover in answer to a letter written by them.

Defendant testified that he sent his wife to rent the house last of February, 1890, and corroborates his wife's testimony as to the directions he gave and the information he received from her; that he thereafter saw Otto, and informed him that he would not rent it for a year, and Otto refused to let him have it for six months. Shortly after this, the property was taken out of the hands of the Ottos and given to one Ferguson for sale; defendant saw him and offered to take the house by the month, each to give the other thirty days' notice to quit. Ferguson desired defendant to see plaintiff, and he did so, informing her of the arrangement; that she replied that any arrangement made with Ferguson was satisfactory to her; that he continued to occupy the premises under this arrangement, gave the thirty days' notice to quit, and moved out, paying rent to July first, and caused the keys of the house to be sent to plaintiff. Julius H. Haffner testified that he was employed by Ferguson as bookkeeper, etc.; that it was his

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recollection that plaintiff brought the keys to the office; that they had been since used to go through the house, and that Ferguson gave to plaintiff defendant's check for rent. Robert Ferguson testified that he talked with plaintiff about selling her property, also renting it; she informed him that Mrs. Kirkover and herself had been talking for some time about renting the house, but she was more interested in selling it, and said she had not rented it. This was in March; but that she had a talk with Mrs. Kirkover after. That he talked with defendant about renting the house, and also about quitting.

This constituted substantially defendant's testimony. Plaintiff denied that she ever authorized Ferguson to rent, but employed him to sell. She also denies that defendant told her of the arrangement with Ferguson, or that she assented to it, but admits having a conversation with him in which he stated he would move out on thirty days' notice if sold, and was unable to recall all the conversation. She also testified that the letter written to Otto was written before the conversation with Mrs. Kirkover, but admits that she told the latter that Otto had advised her not to rent for six months. The referee found that defendant made the arrangement with Ferguson to rent the premises from month to month in the latter part of April, 1890, subject to the approval of plaintiff, and refused to find that defendant communicated the arrangement to plaintiff, or that she assented thereto. He then found, that before the 1st day of May, 1890, a contract of rental was made for six months. I am of opinion that the latter finding is against the weight of testimony given upon the trial. It is quite clear that there was but one conversation had between plaintiff and defendant's wife, as the plaintiff only testified to one conversation, and in that she is corroborated by her daughters. It, therefore, becomes important to see when that took place. Plaintiff says it was a few weeks prior to May first, and in her letter that it was March eighteen. Mrs. Cornwell says that it was in the spring of 1890, and Mrs. Bartlett places it in February or March. This certainly was when the contract was made, if made at all. Defendant's testimony is to the

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effect that this interview took place last of February. There is no room in this testimony to find that more than one conversation was had, and as I view the testimony, the date of that, is fixed prior to March nineteenth. It was upon that date, that plaintiff wrote the letter to Otto. She had then conversed with Mrs. Kirkover the day before, for she says so. This date corresponds with her oral testimony, is almost identical with that of Mrs. Bartlett and is in substantial harmony with the statement of defendant and his wife. The date of the interview thus being fixed, by almost undisputed testimony, what is the conclusion that then rested in the mind of the plaintiff? Clearly that she had not rented the premises, for she then states that she had failed to agree with Mrs. Kirkover, was seeking another party and called upon Otto to rent it. If her written declaration stood alone, in connection with the other circumstances, it would be sufficient to my mind to show that no contract was made, but in addition to this is the testimony of Otto that she orally informed him that she had not rented it and determined not to for less than a year. And sometime after, when she had taken the property out of the hands of Otto, she informed Ferguson that she had not rented it, and this was certainly sometime after the interview with Mrs. Kirkover. Under such circumstances the declaration of plaintiff that the interview was after the letter was written, is not of sufficient force to overcome it. She must have been clearly mistaken in that regard, for therein she contradicts every witness who was sworn upon that subject, as well as the circumstances, and her own letter. The findings of the referee in this light show a strange incongruity, as he first found that defendant made his arrangement with Ferguson the last part of April, 1890, and then before the first of May rented for the six months. We may infer that what rested in the mind of the referee was that defendant arranged with Ferguson, but that such arrangement was not ratified by plaintiff, and that thereafter he made the contract for six months. But as we have already seen, the contract, if it was made, must have been some weeks prior to the last of April,

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upon practically undisputed testimony. The first finding is, however, important, as it shows that defendant understood he had not then rented, and the testimony shows that plaintiff understood she had not leased. Under these circumstances I am unable to see how the finding of a contract can be supported. Where the evidence fails to establish the cause of action or the finding is against the weight of the testimony, it should be set aside. I am of opinion the rule must be applied here. *Browne* v. *Berger*, 14 N. Y. St. Repr. 60; *Bruyn* v. *Russell*, 33 id. 50; *Long* v. *Fong*, 25 id. 28; *Stillwell* v. *Mutual Life Ins. Co.*, 72 N. Y. 388.

The judgment appealed from is reversed and a new trial ordered before another referee, with costs to abide the event.

WHITE, J., concurs.

Judgment reversed, new trial granted, costs to abide event.

BLOOMINGDALE *v.* BRINCKERHOFF.

(New York Common Pleas—General Term, December, 1892.)

In an action to recover for necessaries alleged to have been supplied to defendant's wife upon his credit, it appeared without contradiction that for nearly two years before the supplies were furnished, defendant and his wife were living in a state of voluntary separation, and during all that time the former had paid the latter a weekly allowance for her separate maintenance. *Held*, that a tradesman who supplied the wife with necessaries, upon the credit of the husband and without his express sanction, did so at his peril. If it could be shown that in consequence of the inadequacy of the husband's provision the necessaries were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse and her station in the community, a different rule would apply.

APPEAL from a judgment for defendant, rendered in a District Court in the city of New York.

Action to recover for necessaries alleged to have been supplied to defendant's wife upon his credit.

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Samuel D. Levy, for plaintiff (appellant).

Ezekiel Fixman, for defendant (respondent).

BISCHOFF, J. Careful scrutiny of the evidence, shows that defendant was sought to be held liable in this action upon his wife's alleged implied authority to pledge her husband's credit for necessaries supplied to her at her request. For the defendant, however, it appeared without contradiction that for nearly two years before the alleged necessaries were supplied, husband and wife were living in a state of voluntary separation, and that during all this time the husband had regularly paid his wife a weekly allowance of fifty dollars for her separate maintenance and support.

That, irrespective of whether or not the person who supplies the wife with necessaries had knowledge at the time of the husband's provision for her support, the presumption of the wife's authority to pledge her husband's credit is negatived by the fact of their living apart, and that the tradesman who supplies her under such circumstances, upon the credit of her husband and without his express sanction or approval, does so at his own peril, are propositions too well established by authority to admit of further dispute. See the rule stated and the cases collated in Hare & Wallace's notes to *Manby* v. *Scott*, *Montague* v. *Benedict* and *Seaton* v. *Benedict*, reported in Smith's Leading Cases, 436, etc.; Tyler Infancy & Coverture, § 221; Schouler's Husband & Wife, § 117; *Baker* v. *Barney*, 8 Johns. 72; *Lockwood* v. *Thomas*, 12 id. 248.

It was incumbent upon plaintiff, therefore, to proceed still further and show that the articles supplied to the wife were not only of the kind usually denominated necessaries, because their need is common to all persons, but that in consequence of the inadequacy of the husband's provision they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community. Schouler's Husband & Wife, § 103; *Keller* v. *Phillips*, 39 N. Y. 351; *Arnold* v. *Allen*, 9

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Daly, 198; *Blowers* v. *Sturtevant*, 4 Denio, 46. This, however, the evidence wholly failed to establish.

Daubney v. *Hughes*, 60 N. Y. 187, seemingly cited by appellant's counsel in support of his contention of defendant's liability, has no application to the question here involved. In the case cited, the husband was adjudged liable for his wife's support, upon his express promise, notice of the revocation of which was not brought to the promisee's knowledge.

Judgment affirmed with costs.

GIEGERICH, J., concurs.

Judgment affirmed.

COHEN *v.* SALET.

(New York Common Pleas — General Term, December, 1892.)

In an action by plaintiff, as assignee of one J. C., to recover the value of clothing alleged to have been consigned for sale by plaintiff's assignor to defendant, the latter admitted the receipt thereof, but denied it was of the value alleged, or that the clothing was the property of plaintiff's assignor, or consigned to him by the latter, but on the contrary alleged that the same was consigned to him for sale by one B. C., the owner, for whose account it was sold, and that the proceeds, after deducting therefrom the commissions and expenses of sale, as well as a demand existing in favor of defendant against said B. C., were remitted to the latter. In giving judgment for plaintiff, the trial justice credited defendant with the amount of his claim against B. C. *Held*, that having credited plaintiff's claim of ownership, it was error to credit the defendant with the amount of his claim against said B. C.

APPEAL by plaintiff from a judgment in his favor rendered in a District Court in the city of New York.

Action for conversion of the proceeds of a quantity of clothing alleged to have been consigned to defendant for sale.

A. Morris, for plaintiff (appellant).

A. & L. Levy, for defendant (respondent).

BISCHOFF, J. An examination of the proceedings on the trial reveals the justice of plaintiff's contention that the amount awarded him in the trial court is inadequate.

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Plaintiff sued as the assignee of one Joseph Cohen to recover the value of 300 pieces of clothing alleged to have been consigned by the assignor to the defendant for the purposes of sale, and to have been worth sixty-five cents each. Defendant admitted the receipt of 300 pieces of clothing, of which he alleged 204 were worth forty-five cents each, and the remainder worthless, but he denied that the clothing was the property of plaintiff's assignor, or consigned to him by the latter, and further alleged that it was consigned to him for sale by one Benjamin Cohen, the owner, for whose account it was sold, and the proceeds, after deducting therefrom the commissions and expenses attending the sale, as well as a demand existing in favor of the defendant against Benjamin Cohen, remitted to the latter.

It is apparent that the trial justice credited plaintiff's claim of ownership, and that being so, it was error to credit the defendant with the amount of his claim against Benjamin Cohen, on account of the proceeds of the sale of the clothing, which is evident from the fact that the amount awarded plaintiff is but $20.19

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Pryor, J., concurs.

Judgment reversed, new trial ordered, cost to abide event.

Dietlin v Egan.

(New York Common Pleas—General Term, December, 1892.)

A reargument will not be granted where the point relied upon as a ground therefor was not urged upon the original argument.

Motion by appellant for reargument.

Daly, Ch. J. The ground of claim for reargument stated in the notice of motion is that the court omitted to consider the question whether the court below refused defendant's

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motion to vacate the attachment for want of power. No other ground appears in the motion papers. The affidavit sets out that the appellant's counsel, through his inadvertence and negligence, while presenting the point, did not present any authority on the question of the failure of the court to exercise its power.

A reference to the appellant's brief upon the argument of the appeal in this court shows that he did not base his appeal upon error in that the court below refused to vacate the attachment for want of power. His point simply was that the court "practically refused to entertain the application on the ground of want of power." Point 19, appellant's brief. And he refers to the opinion of the General Term of the City Court printed at folio 75 of the case. A perusal of that opinion fails to show that the City Court doubted its power to afford the appellant the relief he asked; on the contrary, it appears that in denying the motion, the court exercised its discretion upon the facts. The opinion is as follows: "The attachment was issued upon sufficient facts which are controverted by defendant. The issue so raised should be determined by a jury, and not by a justice sitting in chambers, and upon affidavits. The motion to vacate attachment was properly denied, and order appealed from must be affirmed, with costs."

This disposition of the matter was in the exercise of a discretion which undoubtedly resided in the General Term, either to try the issues in the case (for the motion of defendant to vacate the attachment was based upon a denial of the cause of action and upon the defense of usury), upon affidavits, or to decline to do so, but nowhere does the court intimate any doubt of its power to take either alternative. This being so, there is no ground for reargument upon the merits of this motion.

Nor does the appellant bring himself within the rule as to reargument laid down by this court following the Court of Appeals. Rule 16. It is not shown that any question decisive of the case has been overlooked by the court after being presented by counsel upon the argument; nor that the decis-

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ion is inconsistent with any statute or controlling decision to which the attention of the court was not drawn. The point relied upon now as a ground of this motion was not urged, as we stated above, upon the appellant's brief; he only complained that the court "practically" refused relief on the ground of want of power, and no basis for even this modified claim was presented.

Motion denied, with ten dollars costs.

Bischoff and Pryor, JJ., concur.

Motion denied.

Dows *v.* Morrison.

(New York Common Pleas — General Term, December, 1892.)

It is error to allow on trial an amendment of a complaint by adding thereto a new and inconsistent cause of action.

Section 2944 of the Code of Civil Proceedure is not applicable to District Courts of the city of New York.

Appeal from a judgment in favor of the plaintiff rendered by a District Court in the city of New York. Action to recover salary due plaintiff as defendant's employee.

Charles H. Preyer, for plaintiff (respondent).

Jacob F. Miller, for defendant (appellant).

Bischoff, J. On the argument of this appeal we intimated our opinion that plaintiff's employment by defendants' cashier, Osborn, at the salary of ninety dollars per month was within the latter's apparent authority and to this, upon attentive examination of the evidence, we adhere.

We also, at the time, expressed our view that it was error for the trial justice at the trial and in fact after the trial was begun to allow an amendment of the complaint by adding thereto a new and inconsistent cause of action, to wit: damages for breach of the contract of employment, and that defendant's exception to the allowance was well taken, but at the

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solicitation of respondent's counsel the question was reserved for further consideration.

Section 2944, of the Code of Civil Procedure, which is the only alleged authority for the amendment to which we have been referred by counsel, proves to be exclusively applicable to Justices' Courts. But assuming it to apply as well to the District Courts in the city of New York neither of the cases to which our attention has been directed sanctions the construction requisite to support the amendment. Nor have we been able to ascertain as the result of our own researches that the section, which is but a re-enactment of former provisions affecting Justices' Courts has ever received that construction (Chap. 344, Laws of 1857).

The judgment should, therefore, be reversed and a new trial ordered with costs to the appellant unless respondent within five days consents in writing that the judgment be reduced to sixty dollars, the amount of salary due at the time of his discharge, with interest and the costs of the court below, and upon such consent the judgment so reduced is affirmed without costs.

PRYOR, J., concurs.

Judgment affirmed.

FULTON v. METROPOLITAN LIFE INS. CO.

(New York Common Pleas — General Term, December, 1892.)

A motion for leave to appeal to the Court of Appeals should not be granted unless a novel question of law is involved.

MOTION for leave to appeal to the Court of Appeals.

A. I. Sire, for plaintiff (respondent).

William H. Arnoux, for defendant (appellant).

BISCHOFF, J. No sufficient ground is assigned in support of this motion. Reference to the opinions (19 N. Y. Supp. 660) disclosed that no novel question of law was involved in the appeal, which is our only justification for adding to the

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seriously lengthened calendar of the court of last resort. Hence, the leave asked for, if granted, could result only in vexations, delay and expense to the respondent. Motion denied, with ten dollars costs.

DALY, Ch. J., and PRYOR, J., concur.
Motion denied.

HARTLEY *v.* MEYER.

(New York Common Pleas—General Term, December, 1892.)

A mortgage, whether it be regarded as an estate in, or only a lien upon premises, operates as a transfer of the reversion after the mortgagor's default and foreclosure, to which the enjoyment of the rent is but an incident, and its record is notice of the fact to a lessee.

A corporation owning premises, mortgaged the same, and subsequent thereto, April 1, 1891, leased a portion thereof to its manager. After the execution of the lease, the corporation became indebted to the tenant, its manager, and his wife, for money loaned, and the president and the manager, claiming to act under authority, entered into an arrangement whereby the unmatured rent reserved, was appropriated and applied in extinguishment of the indebtedness. Thereafter, the mortgage was foreclosed, and the manager-tenant, who was an obligor under a junior mortgage, was made a party defendant, and on the sale the property was bought in by plaintiff. The conveyance thereof to him, was "subject to all valid leases of said premises made prior to the 12th day of October, 1891." Defendant defaulted in the payment of a month's rent, and summary proceedings to recover possession were begun. On the trial, defendant urged the arrangement with the mortgagor, it being conceded that the month's rent was not otherwise paid. The trial court held that the evidence was insufficient to establish the authority of the president and manager of the mortgagor to enter into the arrangement in question, and directed an order awarding possession of the premises to the purchaser on the foreclosure sale. On appeal from that order, *held*, that the authority of the officers of the mortgagor, to make the arrangement mentioned, and the right of the purchaser on the foreclosure to attack such authority, was immaterial; that the mortgagor's officers could not conclude the mortgagee from any rights which he, or the successors of his interest, might have to the enjoyment of future accruing rents, without his or his successor's assent.

APPEAL from a final order made by a District Court in the city of New York, awarding the delivery of the possession of

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the demised premises to the landlord, in summary proceedings to recover such possession, instituted for default in the payment of rent.

Allan McCulloh and *Chas. W. Pierson*, for landlord (respondent).

Melville H. Regensburger, for tenant (appellant).

Bischoff, J. The Lexington Improvement Company, as owner of the premises 128 East Thirty-fourth street, in the city of New York, by mortgage dated November 27, 1888, and recorded on the next succeeding day, mortgaged the same to the Washington Life Insurance Company, and by indenture dated April 1, 1891, leased a portion of the same premises to Arthur L. Meyer, its manager, for eighteen months from said April 1, 1891, at the monthly rental of $250, payable in advance. Subsequently to the mortgage, the mortgagor became indebted to Meyer in the sum of $1,500 for salary, and to his wife in the sum of $2,200 for money loaned, and in September, 1891, the president of the mortgagor and Meyer, its manager, claiming to act under authority from the mortgagor, entered into an arrangement whereby the unmatured rent reserved, was appropriated and applied in extinguishment of the mortgagor's indebtedness to Meyer and his wife. Thereafter, the mortgagee commenced its action to foreclose the mortgage, to which Meyer, who was also an obligor under a junior mortgage, was made a party, which action terminated in a judgment of foreclosure and sale, in the execution of which Marcellus Hartley, the landlord and respondent in these proceedings, became the purchaser; and by deed dated and recorded January 13, 1892, the mortgaged premises were conveyed to him "subject to all valid leases of said premises made prior to the twelfth day of October, eighteen hundred and ninety-one." Thereafter, Hartley demanded payment of Meyer, the tenant and appellant herein, of $250 for one month's rent, which pursuant to the terms of Meyer's lease, would have matured on February 1, 1892, and, default

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having been made in such payment, pursuant to the provisions of sections 2231 and 2235 of the Code of Civil Procedure, for such cases made and provided, instituted summary proceedings to recover possession of the demised premises. On the trial, the tenant urged the arrangement with the mortgagor whereby all the unmatured rent reserved by his lease was credited to it in payment of its indebtedness to the tenant and his wife, in refutation of the alleged default, it being conceded that the rent maturing on February 1, 1892, was not otherwise paid; but the learned trial justice being of the opinion that the evidence was insufficient to establish the authority of the president and manager of the mortgagor to enter into the arrangement on its behalf, directed a final order to issue awarding delivery of the possession of the demised premises to Hartley, from which an appeal is taken to us.

In our opinion, all inquiry touching the authority of the officers of the mortgagor to make the arrangement above mentioned, and to the right of the purchaser under the foreclosure sale to attack such authority, is immaterial and for the purposes of determining the question involved on this appeal it may be assumed both that the officers mentioned did not transcend the legitimate exercise of their respective functions, and that the purchaser is not in a position to assail their authority; but while this may be so, the mortgagor's officers did not undertake to conclude the mortgagee from any rights which he, or the successor of his interests, might have to the enjoyment of future accruing rents, nor could they have done so without the mortgagee's or his successor's assent.

The mortgage, whether it be regarded as an estate in, or only as a lien upon, the mortgaged premises, operated as a transfer of the reversion after the mortgagor's default and foreclosure to which the enjoyment of the rents was but an incident, and its record was notice of that fact to the lessee; and if despite such transfer and notice, the lessee chose to anticipate the unmatured rent by payment to the mortgagor without the mortgagee's assent he should be considered as having done so at his own peril. The acceptance of a con-

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veyance "subject to all valid leases of said premises made prior to the twelfth day of October, eighteen hundred and ninety-one" implies nothing more than a recognition by the purchaser at the foreclosure sale of leasehold estates carved out of the reversion upon the performance of the conditions subject to which they were granted, and had the effect of placing the lessees in the condition of lessees under leases made before the mortgage foreclosure with the same rights, no more and no better. Lessees who become such subsequent to the mortgage foreclosure, if made parties to the foreclosure proceedings, are divested of their estates by the judgment and sale thereunder and may be proceeded against as trespassers; and the rents accruing from lessees under leases made before the mortgage may be intercepted by the mortgagee or his successor in interest in the proper proceedings instituted for such purposes. Wood's Landlord & Tenant 183, etc., and cases collated in the notes.

Assuming, therefore, that Meyer's lease was made before the mortgage, its record, or his possession of the demised premises, would have constituted notice to the intending mortgagee sufficient to have called upon him for inquiry concerning the lessee's rights; and if it then appeared that the unmatured rent reserved had been anticipated by payment, the mortgagee's rights would be properly subjected to the lessee's right of continued possession growing out of his payment of the rent reserved. But if the unmatured rent had not at the time been anticipated by payment, then the subsequent record of the mortgage was notice to the lessee of the mortgagee's or his successor's right to intercept the rents upon the mortgagor's default and foreclosure, and of this right neither the mortgagee, nor his successor in interest, the purchaser at the foreclosure sale, can be deprived, unless it be with his assent.

The proposition of the tenant, if countenanced, would lead to the absurd result of enabling the mortgagor first to secure the value of his estate in the lands mortgaged by means of the sum advanced to him on the mortgage, and to secure it again by compounding the rents to mature under a prior existing

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lease, and to that extent diminishing the value of the mortgage security.

The order appealed from should be affirmed, with costs.

Bookstaver, P. J., concurs.

Order affirmed.

McGrath v. Mangels.

(New York Common Pleas—General Term, December, 1892.)

The determination of a disputed question of fact tried before a justice without a jury will not be interfered with on appeal unless there is a palpable miscarriage of justice.

A contention made by a party on an appeal which is inconsistent with his attitude on the trial is not available.

Appeal from a judgment for defendant rendered by a District Court in the city of New York.

Action to recover for moneys had and received to the use of the plaintiff, under an agreement for the sale of a mare with privilege to the plaintiff to return her, if upon trial she should not prove satisfactory to him or prove to be not as represented.

William H. Hamilton, for plaintiff (appellant).

Lewis J. Conlan, for defendant (respondent).

Bischoff, J. It is conclusively apparent from the pleadings and proceedings upon the trial that plaintiff sought to recover in this action upon an alleged oral agreement between the parties to refund the purchase money, if upon trial, the mare should not prove satisfactory to plaintiff. The fact of any such agreement was unequivocally denied by the defendant and it is not supported by plaintiff's letter of April 11, 1892, addressed by him to the defendant with the check for the purchase money, upon receipt of which defendant delivered the mare to the plaintiff. Whether, or not, such was the agreement was, therefore, a question of fact which the trial court was called upon to determine upon the conflicting testimony of the witnesses, and careful consideration of all the evi-

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dence fails to convince us that there was such a preponderance for plaintiff that it was legal error for the court below to determine that question adversely to him.

Recovery was sought, not for breach of an alleged warranty in the sale of the mare, but upon defendant's alleged promise to return the purchase money paid him which was, upon the evidence, predicable at most of his agreement to return it if the mare was "not as represented." What the representations were, and whether they were true or false, were likewise questions of fact determinable only from the testimony of witnesses, and with the determination of the trial court upon conflicting testimony we cannot interfere, except where there is a palpable miscarriage of justice. *Weiss* v. *Strauss*, 39 N. Y. St. Repr. 78; *Baird* v. *Mayor, etc.*, 96 N .Y. 567.

We have not failed to notice appellant's contention that the sale of the mare was not completed because defendant did not accede to the conditions stated in plaintiff's letter of April 11, 1892, and hence, that the law implied a promise to return the purchase money which accompanied the letter. This contention, however, is plainly inconsistent with plaintiff's attitude on the trial, and, therefore, not now available. *Fultor* v. *Metropolitan Life Ins. Co.*, 19 N. Y. Supp. 660; *Fay* v *Muhlker*, 1 Misc. Rep. 321.

So, also, it is urged for reversal of the judgment that plaintiff's letter of April 11, 1892, constituted an agreement in writing and that it was error for the trial court to admit parol evidence concerning the nature of defendant's representations, but as the latter, if treated as an agreement, is plainly incomplete as such, in omitting to state what the representations were, the evidence objected to was properly admitted. *Lamson Con. Store Service Co.* v. *Hartung*, 18 N. Y. Supp. 143; 19 id. 234.

The judgment should be affirmed, with costs.

Pryor, J., concurs.

Judgment affirmed.

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Nette *v.* N. Y. Elevated R. Co.

(New York Common Pleas — General Term, December, 1892.)

In an action against an elevated railroad for damages to abutting property, the proximity of the railroad and its station to the premises in question, and the extensive communication with the premises thereby afforded, is evidence of benefits accruing to said property from the maintenance of said railroad, and the refusal of the referee to consider such, is error sufficient to grant a new trial.

Motion for reargument.

J. Aspinwall Hodge, Jr., for the motion.

W. R. Page, in opposition.

Pryor, J. The decision on appeal was based upon the refusal of the referee to find that, "in estimating the damages herein, if any, the benefits accruing to said premises and peculiar thereto, from the maintenance and operation of said railway should be set off against any inconveniences resulting from said railway to said premises." Counsel for the motion objects that the case shows no evidence of benefits. We think otherwise. The proximity of the railroad and its station to the premises, and the extensive communication with the premises thereby afforded and facilitated, in itself is evidence of benefits. *Drucker* v. *Man. R. R. Co.*, 106 N. Y. 164. In *Flynn* v. *Taylor*, 127 N. Y. 600, the court said that the diversion of travel is presumed to cause special damages, "because diversion of trade inevitably follows diversion of travel." The converse of the proposition must be true; namely, that increase of trade inevitably follows increase of travel. At all events, the fact was for the judgment of the referee, but his refusal to consider special benefits, necessarily involves the elimination of the fact in his estimate of damages. Other facts in the case might indicate to the referee the probability of benefits. Counsel for the motion urges that "the defendants did not ask the court to find that there were any benefits." But, their claim, by the request to find, that the

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referee should allow for benefits in the estimate of damages, implies that, upon the evidence, benefits were apparent.

Counsel concedes that if there were an exception to the rejection of evidence of benefits it might be fatal to the motion; but, obviously, of equivalent effect is the exception to the refusal of the referee to consider benefits.

The court did not overlook the refusal to find defendant's thirtieth request; that refusal, however, is of no materiality to the present purpose, since, assuming the converse of the proposition, the referee might have found "a diminution of the fee value in consequence of the railroad," because of the rejection of benefits in his estimate.

Again, counsel argues, that even though benefits be allowable, they go only in reduction of damages, and do not affect plaintiff's right to injunctive relief. Seeing that the plaintiff would be entitled to such relief only in the event of substantial injury (*Gray* v. *Manhattan R. Co.*, 128 N. Y. 500), how can we say that, if the referee had considered benefits, he would not have found the fact of no substantial injury?

Counsel adduces considerations affecting the merits of the action, but they are of no relevancy to the present application.

Counsel for the motion fails to present a case within rule 16 of this court, and within the general principle regulating the allowance of rearguments. *Fosdick* v. *Town of Hempstead*, 126 N. Y. 651; *Mount* v. *Mitchell*, 32 id. 702; *Curley* v. *Tomlinson*, 5 Daly, 283; *Banks* v. *Carter*, 7 Daly, 417; *Welsh* v. *New York Elev. R. Co.*, 40 N. Y. St. Repr. 990.

We adhere to the opinion that, in the interests of justice, a new trial of the action should be had.

Motion denied, with costs.

Daly, Ch. J., and Bischoff, J., concur.

Motion denied.

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People *v.* Cohen.

(New York Common Pleas — General Term, December, 1892.)

Remission of a forfeited recognizance should be granted upon filing the certificate of the district attorney to the effect that the expenses incurred in the apprehension of the accused, and the costs and expenses incurred in the enforcement of the forfeiture, have been paid, or that there were no such costs or expenses.

Application for remission of forfeited recognizance, etc.

Bischoff, J. Upon filing the district attorney's certificate to the effect that the expenses incurred in the apprehension or recapture of the accused, and the costs and expenses incurred in the enforcement of the forfeiture, have been paid, or that there were no such costs or expenses, this application should be granted. The certificate annexed to the petition is deficient in the respect mentioned. *People* v. *Lasher*, 11 N. Y. Supp. 711.

Daly, Ch. J., and Pryor, J., concur.

Motion denied.

Riche *v.* Martin.

(New York Common Pleas — General Term, December, 1892.)

Where plaintiff's recovery is substantially the sum which defendant conceded due on trial, a motion by the latter for leave to appeal to the Court of Appeals is without merit, and should be denied.

Defendant's motion for leave to appeal to the Court of Appeals.

Bischoff, J. In view of the fact that plaintiff's recovery is substantially the sum which defendant conceded to be due him on the trial, this motion seems to be without merit.

Motion denied, with ten dollars costs.

Daly, Ch. J., and Pryor, J., concur.

Motion denied.

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Ryan v. Jones.

(New York Common Pleas — General Term, December, 1892.)

In an action for rent, it appeared that the premises demised was part of a building which comprised several distinct tenements so constructed that each was substantially dependent for comfortable inhabitation during the colder season upon a furnace and boiler situated in the cellar, from which steam heat was distributed by conduits to the several tenements; that of this furnace and boiler the landlord had reserved exclusive control. Plaintiff's lease was in writing, and contained the ordinary covenants. The landlord did not bind himself to supply any heat whatever. *Held*, that the landlord was bound to furnish an adequate supply of heat notwithstanding the absence of any provision to that effect in the lease, and a failure on his part to do so substantially deprived the tenant of the beneficial enjoyment of the premises which was sufficient to allow him to abandon the premises and interpose a defense of eviction.

In order to justify such an abandonment, the deprivation of such heat must be continued at the time thereof.

Appeal from a judgment for plaintiff rendered in the District Court in the city of New York.

Action to recover rent, the defense being an alleged surrender of the lease by mutual agreement and eviction before accrument of the rent.

Wm. King Hall, for plaintiff (respondent).

Charles H. Preyer, for defendant (appellant).

Bischoff, J. The action was to recover rent accruing April 1, 1892, and the defenses were surrender of the leases by mutual agreement and eviction.

The surrender was predicated of an alleged oral agreement with plaintiff's agent, the making of which, the latter, however, emphatically denied. Acceptance of the keys did not of itself constitute an acceptance of the surrender of the lease (*Thomas* v. *Nelson*, 69 N. Y. 118; *Winant* v. *Hines*, 14 Daly, 187; *Spies* v. *Voss*, 16 id. 171), and a conflict of testimony respecting the alleged agreement does not afford sufficient ground for reversal, if it is not apparent that justice has been perverted. *Weiss* v. *Strauss*, 39 N. Y. St. Repr. 78.

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On the trial, it appeared that the building No. 157 West One Hundred and Nineteenth street, in the city of New York, comprised nine distinct tenements or "flats" so constructed that each was substantially dependent for comfortable inhabitation during the colder season upon a furnace and boiler situated in the cellar, from which steam heat was distributed by conduits to the several tenements and there diffused by means of "radiators;" and that of the furnace and boiler the landlord had reserved exclusive control.

It further appeared, that two of these tenements had been demised to defendant under a written lease, dated October 30, 1891, for the term of one year, commencing November 1, 1891, at a monthly rental of ninety dollars payable in advance; that defendant was restricted in the occupation of the demised premises for the purposes of a private dwelling; and that alterations therein by the tenant were inhibited except with the written consent of the landlord. The lease did not in terms bind the landlord to supply any heat whatever, which was required in the use of the tenements.

We may assume for the purposes of this appeal, as contended by the defendant, that the facts stated, constituted the adequate supply of heat by the landlord an integral part of his covenant that during the term demised, the tenant may quietly have, hold and enjoy the premises; and that for the breach of it, whether due to acts of omission or of commission, whereby the tenant is substantially deprived of his right to their beneficial enjoyment, he may abandon the premises and successfully interpose as a defense to a demand for subsequently accruing rent that he was evicted by the landlord. *West Side Bank* v. *Newton*, 76 N. Y. 616; *Denison* v. *Ford*, 7 Daly, 384; *Duff* v. *Hart*, 40 N. Y. St. Repr. 676; *Lawrence* v. *Mycenian Marble Co.*, 1 Misc. Rep. 105. But we are notwithstanding of the opinion that the defense of eviction was not established.

To justify the tenant's abandonment of the demised premises it is not enough that at some time during the period of his occupancy he was deprived of their beneficial enjoyment

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by the wrongful act of the landlord, but it should appear that the deprivation was persisted in and continued at the time of the abandonment (*Gilhooley* v. *Washington*, 4 N. Y. 217; *Edgerton* v. *Page*, 20 id. 281; *Boreel* v. *Lawton*, 90 id. 293; *Koehler* v. *Scheider*, 15 Daly, 198); and hereof the evidence is deficient.

It was conceded that the landlord did supply heat and the utmost which may be successfully claimed for the evidence is that it established the fact of the landlord's neglect or refusal to furnish an adequate supply during the colder season preceding defendant's removal. Defendant, however, did not quit possession until April first, and from the advent and propinquity of seasons of greater clemency respecting the need of heat for the comfortable inhabitation of the demised premises, the trial justice was authorized to find that at the time of defendant's alleged motion, the grounds of former complaint had ceased to be relevant, and that the full enjoyment of the demised premises had then been restored to him.

The exceptions to the rulings on the trial present no error, and the judgment should, therefore, be affirmed with costs.

Pryor, J., concurs.

Judgment affirmed.

Schwartz *v.* Wechler et al.

(New York Common Pleas — Additional General Term, December, 1892.)

An action lies against members of an unincorporated association without first obtaining judgment against the association.

District Courts of the city of New York have no power to set aside verdicts of a jury, and grant new trials.

Appeal by the defendants, Joseph Eichler, Ignatz Bleich and Mandel Friedman, from a judgment of a District Court in the city of New York, in favor of the plaintiff.

The opinion states the case.

Sigmund Feuchtwanger, for defendants (appellants).

Abraham H. Sarasohn, for plaintiff (respondent).

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GIEGERICH, J. This action was brought against Morris Wechler, Joseph Eichner, Ignatz Bleich and Mandel Friedman, for services rendered by the plaintiff and his assignor, as teachers in the school known as the Oestreicher Hungarischa Talmud Torah, at No. 102 Cannon street, in this city, it being claimed by the plaintiff that the school was conducted by a voluntary association bearing said name, and of which the defendants were directors and members. The defendants denied that they individually and for themselves, engaged the plaintiff and his assignor, but claimed that they were originally employed by them, or some of them, and others on behalf of the association, which is not disputed by the plaintiff and his assignor. The defendants also claimed that in or about the month of November, 1891, in consequence of the withdrawal by parents of their children from the school in question, the association was unable to pay the teachers any longer, and as an inducement to them to teach, it was agreed between the teachers, including the plaintiff and his assignor, on the one hand, and the association on the other, that the former were not to receive any further compensation from the latter for teaching the children, but were to look solely to the scholars of the school for compensation; that the plaintiff and his assignor expressed themselves as satisfied with that arrangement, and continued to teach school under it. This was denied by the plaintiff, and the jury credited his version of the case.

The defendants contended upon the trial, and now urge as a ground for the reversal of the judgment, that the action cannot be maintained against the defendants as members of the association, because no action has been brought against the president or treasurer thereof. The case of *Flagg* v. *Swift*, 25 Hun, 623, is cited in support of the contention. In that case it was decided that an action cannot be maintained against the individual members of an unincorporated association upon a debt due from the association, unless an action has first been brought against the president or treasurer thereof, as prescribed by section 1919 of the Code of Civil Procedure. This

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decision is based upon *Witherhead* v. *Allen*, 4 Abb. Ct. App. Dec. 628, which arose under the act of 1849, chapter 258, as amended by the Laws of 1853, chapter 153, section 4. The same provides that after judgment against the joint stock company or association, and execution thereon is unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually, as now provided by law. The remaining provisions have no bearing on the question under consideration, and are, therefore, omitted.

As was well said by WILLIAMS, J., in *Humbert* v. *Abeel*, 7 Civ. Pro. Rep. 417, 421: "Under those provisions, it could not be held otherwise than it was held in *Witherhead* v. *Allen*, but under the provisions of the Code of Civil Procedure, the rule must be held entirely different." Section 1923 of the Code prescribes that: "This article (Chap. 19, art. 1, title V) does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section." Section 1922 prescribes: "Where an action has been brought against an officer, or a counterclaim has been made in an action brought by an officer, as prescribed in the last three sections, another action for the same cause shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon." Mr. Throop, in his notes on the New Code (Ed. 1891, p. 210), says: "The prohibitory clause of section 4 of the act of 1849, as amended in 1853, has, therefore, been omitted; and to guard against a possible misconstruction of this article, an express provision, declaring it to be permissive, has been added as section 1923."

The right to maintain an action against the members of an unincorporated association without first obtaining a judgment against the association is, therefore, expressly given by section 1923 of the Code, and it follows that it was not necessary for the plaintiff, as a condition to the maintenance of this action, to first bring suit against the president or treasurer of the association. This conclusion is in accord with the views

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expressed by the court in *Humbert* v. *Abeel*, 7 Civ. Proc. Rep. 417, 421, and *Hudson* v. *Spaulding*, 6 N. Y. Supp. 877, regarding the right to maintain an action against the members of an unincorporated association. It is manifest that the provisions of the Code above cited were either disregarded or overlooked by the court in *Flagg* v. *Swift*, 25 Hun, 623.

The appellants contend further that the present action is not maintainable because all the members of the association were not made parties defendant. The record shows that the defendants answered as follows: "Defendants Bleich and Friedman, nonjoinder defendants, general denial; other defendants plead general denial." This is clearly insufficient, because the names of the persons who it is claimed should have been made additional parties to the action are not stated. *Hawks* v. *Munger*, 2 Hill, 200; *Wigand* v. *Sichel*, 3 Keyes, 120; *Fowler* v. *Kennedy*, 2 Abb. Pr. 347, 351; *Wooster* v. *Chamberlin*, 28 Barb. 602; *Maxwell* v. *Pratt*, 24 Hun, 448; *Kingsland* v. *Braisted*, 2 Lans. 17; *Humbert* v. *Abeel*, *supra*.

Even had the alleged nonjoinder been properly pleaded, the record shows that the defendants did not introduce any testimony in support of the same, and it seems that this defense was entirely abandoned by the defendants upon the trial. Upon the coming in of the verdict, the defendants made a motion to set aside the verdict and for a new trial, upon the following grounds, viz.: "That the verdict is contrary to the evidence and contrary to law and is excessive; that there is no evidence authorizing a judgment for the amount of the verdict, and upon the exceptions taken upon the trial." The justice, with the consent of the plaintiff's attorney reduced the amount of the judgment and denied the motion to set aside the verdict. In doing so, he among other things said: "This is one of the cases where if the power given to the courts of record under section 999 of the Code was conferred on this court, I would not hesitate to set aside the verdict, but the limits within which this court can act, puts it out of my power in this case, to afford the defeated party any relief, and

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the corrective remedy must be sought, if at all, in the appellate court, where under the provisions of the Code matters involved on this motion can be reviewed. If there was absolutely no proof to support the verdict — in other words, if without any evidence to support it a verdict should be rendered — a different conclusion might be reached by me."

It is insisted that the court below had power to set aside the verdict, but we have not been referred to, nor are we aware of any statutory provision which authorizes the District Courts of this city to set aside the verdict of a jury and grant a new trial. The District Courts are courts of an inferior jurisdiction, and, therefore, cannot go beyond the authority conferred upon them by statute. They can assume no power by implication, but must keep within the powers expressly given them, and if they go beyond them their acts are void. Cowen's Treatise, § 650; *Barnaman* v. *Williams*, 18 Abb. Pr. 158; *Hard* v. *Shipman*, 6 Barb. 621. The only statutory provision which we have been able to find relative to the question under consideration, is section 1380 of the Consolidation Act, which provides that judgment must be entered immediately after the rendering of the verdict (Laws 1882, chap. 410), and it would seem from this that the legislature intended to prohibit the justices of these courts from setting aside the verdict of a jury; at all events, it is manifest that the exercise of the power to set aside a verdict is inconsistent with the provisions of the act referred to.

After carefully reading the testimony, we are unable to see on what ground the justice could have granted a new trial, had he the power to do so. The issues to be determined were purely of fact. It has frequently been held in this court that where there is a conflict of evidence, the judgment will not be reversed unless the evidence be of such conflicting character as to clearly indicate that there was a mistake on the part of the jury, that they were influenced by bias, passion, prejudice or corruption, or that they had manifestly neglected to deliberate upon the whole testimony. *Darrah* v. *Boys*, 16 Daly, 209; *Weiss* v. *Strauss*, 39 N. Y. St. Repr. 78. An examina-

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tion of the evidence in this case does not lead to such a conclusion. The case turned upon the question whether the plaintiff and his associates continued to teach under the original agreement whereby they were to be compensated by the association, or whether a new arrangement was made by which the teachers were to look solely to the scholars for compensation. The testimony upon this point is conflicting, and as it was purely a question of fact, which was fairly submitted to the jury, the verdict should not be disturbed merely because had the court below been on the jury it might have reached a different result. The verdict of the jury is sustained by the evidence, and we can find no reason to interfere with their determination of facts.

The judgment should, therefore, be affirmed, with costs.

Bischoff, P. J., concurs.

Judgment affirmed, with costs.

Elze *v.* Baumann.

(New York Superior Court — General Term, January, 1893.)

In an action to recover for personal injuries, the evidence showed that just as plaintiff, a boy six years old, stepped upon a crosswalk to go to the other side of the street, defendant's team swerved, and, though plaintiff tried to recover himself and get back upon the sidewalk, the horses struck him and the wheel went over him, doing serious bodily harm. The driver at the time, was looking behind the wagon or sideways and could not have seen the plaintiff. The trial judge dismissed the complaint upon the ground of absence of negligence on the part of the defendant and of proof connecting defendant with the acts charged, and also on the ground of contributory negligence. *Held*, error; that the negligence of defendant and the absence of contributory negligence of plaintiff might be inferred from the evidence, and the case should have been submitted to the jury.

Appeal by the plaintiff from a judgment entered upon the direction of the trial judge, dismissing the complaint.

Wm. C. Beecher, for plaintiff (appellant).

Benno Loewy, for defendant (respondent).

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McAdam, J. The action was brought to recover $10,000 damages for injuries received by the plaintiff by being knocked down and run over by a two-horse truck, driven by a servant of the defendant. It appears that the plaintiff, a boy then six years of age, started to cross Avenue A at Fifteenth street, July 19, 1889, when the defendant's two-horse truck, in charge of his driver, was being driven up the avenue on the farther side from where the boy was. Just as the boy stepped down onto the crossing the defendant's team suddenly swerved to the left, and though the boy tried to recover himself and get back upon the sidewalk, the horses came so quick that they were upon him before he could do so; he was knocked down, the front wheel passing over him, doing serious bodily harm. When the plaintiff rested his case, the trial judge declined to send the questions of fact involved to the jury for determination, and dismissed the complaint upon the ground of absence of negligence on the part of the defendant and of proof connecting the defendant with the acts charged, and also upon the ground of contributory negligence.

In determining the correctness of the nonsuit, the plaintiff is, under the practice, entitled to the most favorable inferences deducible from the evidence, and all the contested facts are to be deemed established in his favor. *Rehberg* v. *Mayor*, 91 N. Y. 137–141; *Galvin* v. *Mayor*, 112 id. 223–230; *Weil* v. *Dry Dock, etc., R. Co.*, 119 id. 152, 153, and kindred cases. And when from the facts and circumstances shown, inferences are to be drawn which are not certain and incontrovertible, the question becomes one of fact for the jury. *Weil* v. *D. D. R. R. Co., supra.* Where, from the evidence, negligence of a defendant may reasonably be inferred, nonsuit is error. *Hill* v. *9th Ave. R. R. Co.*, 109 N. Y. 239. Where the facts are capable of more than one construction or inferences are to be drawn respecting which minds might differ, the question is one of fact for the jury. *Belton* v. *Baxter*, 58 N. Y. 411; *Thurber* v. *Harlem Bridge, etc., R. Co.*, 60 id. 326; *Maher* v. *Central Park, etc., R. Co.*, 67 id. 54; *Stackus* v. *New York Central, etc., R. Co.*, 79 id. 464; *Hart* v. *Hudson B.*

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Co., 80 id. 622; *Payne* v. *Troy, etc., R. R. Co.*, 83 id. 572; *Harris* v. *Perry*, 89 id. 312.

To justify a nonsuit on the ground of the presence of contributory negligence or the absence of negligence, the facts must appear so clearly that no construction of the evidence, or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict the other way would have been set aside as against evidence. *Kain* v. *Smith*, 89 N. Y. 375. Though the acts of a party might justify a jury in finding contributory negligence on his part, this is not enough. If the acts were capable of different constructions, it was for the jury and not the court to determine which view should prevail. *Steivermann* v. *White*, 48 N. Y. Super. Ct. 523. With this brief review of the facts and of the law applicable to nonsuits, we will proceed to the salient features of the case at bar with reference to the points urged for and against the determination made below.

In order to recover, the plaintiff was bound, of course, to prove negligence on the part of the defendant or his employee in the line of his duty, and freedom from fault on his own part. This lies at the very foundation of the action. The term "negligence" has been variously defined, but, after all, means nothing more nor less than the absence of care according to the nature of the duty and the exigencies of the case. In other words, it is the omission to do something, or the doing of something, which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or omit to do under like circumstances.

To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. *Johnson* v. *Hudson River R. Co.*, 20 N. Y. 73; *Warner* v. *N. Y. C. R. R. Co.*, 44 id. 471; *Cordell* v. *New York Central, etc., R. Co.*, 75 id. 330.

The character of the defendant's delinquency, however, may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary to show by inde-

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pendent evidence that the plaintiff did not bring the misfortune upon himself. No more certain rule can be laid down. *Johnson* v. *H. R. R. R. Co.*, 20 N. Y. 73. Indeed, the absence of any fault on the part of the plaintiff may be inferred from the circumstances, in connection with the ordinary habits, conduct and motives of men. Moak's Underhill on Torts, 311, 312. The accident complained of occurred upon the highway, on which pedestrians have the same rights as drivers of vehicles. These thoroughfares belong to the public and are to be used in common by all alike as circumstances require. *Belton* v. *Baxter*, 54 N. Y. 245; *Brooks* v. *Schwerin*, Id. 343.

The only qualification to this rule is one drivers generally disregard, which is, that upon arriving at street crossings in cities, they are bound to notice foot passengers and take reasonable care not to injure them. If the driver fails to look out for them, or when he sees, does not, so far as in his power, avoid them, he is chargeable with negligence. *Murphy* v. *Orr*, 96 N. Y. 14; *Moebus* v. *Herrmann*, 108 id. 349; *Atkinson* v. *Oelsner*, 10 N. Y. Supp. 822; 32 N. Y. St. Repr. 1088.

These regulations, necessary to protection, apply to men, women and children alike, and in dealing with the question, the law will never hold it imprudent in anyone to act upon the assumption that another in his conduct will act in accordance with the rights and duties of both. *Steiverman* v. *White*, 48 N. Y. Super. Ct. 523. There is no positive rule of law which requires parents to keep their children housed at the peril of losing the safeguards of the law; these are denied to no one. It has been decided that it is not negligence, as matter of law, for the parents of a bright child of but four and a half years old, living in a crowded locality in a city, with no other place for amusement, to permit the child, with proper instructions and directions, against going into the street, to play upon the sidewalk without an attendant, and whether it was negligent, under particular circumstances, is a question of fact for the jury. *Birkett* v. *K. Ice Co.*, 110 N. Y. 504; *McGarry* v. *Loomis*, 63 id. 104; *McGuire* v. *Spence*, 91 id. 303; *Kunz* v. *City of Troy*, 104 id. 344. Nor was it neces-

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sarily negligence for the child to attempt to cross the street. A person on foot has a right to cross the highway when and wherever he pleases, so long as he interferes with the rights of no one else in their use of the public roadway.

The books contain many adjudications in cases where children have been injured while upon the streets, or in efforts to cross them. The earlier cases enforced a strict rule, the later a more liberal one. In *Hartfield* v. *Roper*, 21 Wend. 615, it was held to be negligence to allow a child of tender years to go into the highway unattended. In *Mangan* v. *Brooklyn City R. Co.*, 36 Barb. 230, the court qualified this language by holding it was negligence "knowingly to allow" a child of tender years to go at large in the public streets without a protector. But on reversing the judgment of nonsuit, the Court of Appeals held (*S. C.*, 38 N. Y. 455) "that the escape of the child into the street through an open window, coming to within four feet of the ground, this being his only means of egress, the door being locked, will not warrant the conclusion, as matter of law, that the parent was guilty of negligence." In *Fallon* v. *Central Park, etc., R. Co.*, 64 N. Y. 13, the mother left the child alone in the room adjoining the street, the door being open, with directions to return to the yard, but the child went out into the street, where it was run over by the defendant's car. Held, that the question of the mother's negligence was properly submitted to the jury. Subsequent cases make the rule still more liberal. Reference will be made to but a few.

In *Barrett* v. *Smith*, 128 N. Y. 609, it appeared that a child four years of age was playing on the street, where she was run over by a truck which came upon her unaware. The child, in her terror, first turned one way, and then toward the horses, and got in front of them and was injured. The court said "she tried to save herself from a danger which she might reasonably anticipate, but did precisely the wrong thing. Her mistake, however, does not deprive her of her remedy, provided the jury find that the driver was guilty of negligence." The nonsuit, "which was placed exclusively on the ground of no negligence on the part of the driver," was set aside. In *Levy*

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v. *Dry Dock, etc., R. Co.*, 35 N. Y. St. Repr. 770, it appeared that a child four years of age was run over by one of the defendant's cars. The evidence tended to show that the driver of the car (which was a one-horse car) had his face turned toward the inside of the car, and that he did not turn to look forward until attracted by the cries of the people on the sidewalk. Held, that a nonsuit must be set aside.

In *Mallard* v. *Ninth Ave. R. R. Co.*, 27 N. Y. St. Repr. 801, plaintiff's intestate, a child nine or ten years old, was crossing a street and stopped two feet from the car track with her back to it, to call her companions to follow her. On turning and attempting to cross the track she was struck and run over by a car which was being driven at a rapid pace. Held, (1) That the facts required the submission to the jury of the question whether the car driver exercised ordinary care under the circumstances. (2) If the car driver by the exercise of ordinary care, could have prevented the accident, he was the sole cause of the injury, and the negligence of the child would not prevent a recovery. Nonsuit set aside.

In *Cowan* v. *Snyder*, 5 N. Y. Supp. 340, it appeared that the plaintiff, a boy eight years old, in crossing a railroad track in the street of a city, stumbled and fell, and that while he was in the act of rising, he was struck and injured by a coach and team in charge of defendant's servant. Held, that whether the driver of the coach was negligent was a question for the jury. See, also, *Thurber* v. *Harlem, etc., R. R. Co.*, 60 N. Y. 328. In *Weil* v. *Dry Dock, etc., R. Co.*, 119 N. Y. 147, the plaintiff, a child hardly two years of age, while playing on the street, was run over by one of the defendant's cars. The complaint was dismissed on the ground that the parents were negligent. Held, that this question on the evidence should have been submitted to the jury. Nonsuit set aside.

There are a number of reported cases, holding that it is negligence *per se*, for a foot passenger to attempt to cross a public thoroughfare ahead of vehicles of any kind under such circumstances upon "nice calculations" of the chances of injury, but these were placed upon the ground that the foot

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passenger had no priority over the drivers of vehicles, and that having voluntarily assumed a danger, he cannot complain of the consequences *volenti non fit injuria*. *Belton* v. *Baxter*, 54 N. Y. 245. Of this class is the case of *Fenton* v. *Second Avenue R. R. Co.*, 126 N. Y. 625, relied on by the defendant. There it appeared that an intelligent, healthy lad, ten years of age, attempted to run ahead of a car the horses of which were on a trot. The boy stumbled and fell, and the car passed over him, causing death.

The court held that the car had a preference in the street, that the accident did not happen *at a street crossing*, and hence the driver had no reason to anticipate the presence of the boy in front of his car, and that the boy, seeing the peril, was bound to use reasonable caution to keep out of the way of the impending danger which must have been apparent to him when he unwisely assumed the risk of attempting to escape from it. The judgment entered on a verdict in favor of the plaintiff in the court below was, therefore, properly reversed. The principles laid down in these two cases, have no application, however, to the facts of the present contention, which take it out of the rule established there, and bring it within one entirely different. The distinction is too apparent to require discussion.

In actions for injuries to children, the question prominently discussed is whether or not the child is *sui juris*. If *non sui juris*, there must be concurring negligence on the part of the parents or guardian, and in the absence thereof, the doctrine of contributory negligence has no application. *Kuntz* v. *City of Troy*, 104 N. Y. 351. If the child is *sui juris*, the standard of care to be exercised by it varies with age and capacity. 4 Am. & Eng. Enc. of Law, 43. In examining the cases upon the subject it will be observed that slight circumstances have caused different results, which suggests that care must be taken to discriminate between those in which the child was held to be *sui juris* as matter of law or fact; those in which the finding of negligence on the part of the defendant was the sole point presented to the appellate court for review;

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others in which the child was held to be *non sui juris*, and the point was imputable negligence on the part of the parents or guardian, and the amount and kind of care (depending on the peculiar circumstances) required from them; next, those wherein the child was *sui juris*, and the jury determined the amount of care required by it according to its capacity to appreciate and avoid danger; and lastly those wherein the child was accompanied by protectors or others, in which that fact was considered a material circumstance in determining the question of liability. Indeed, no other controversies present a field in which circumstances and detail play a more important part.

If the child is *non sui juris* it is supposed to be incapable of appreciating the necessity of caution and of exercising judgment and discretion. If *sui juris*, it is, therefore, held only to that degree of care and caution as is reasonably to be expected of a person of his age. *Thurber* v. *Harlem, etc., R. Co.*, 60 N. Y. 326; *O'Mara* v. *Hudson R. Co.*, 38 id. 445; *Ihl* v. *Forty-second St. R. Co.*, 47 id. 317; *Kuntz* v. *City of Troy*, 104 id. 350; Shear. & Redf. on Neg. § 73, and cases cited. In *R. R. Co.* v. *Gladmon*, 15 Wall. 401, HUNT, J., said: "Of an infant of tender years less discretion is required than of an adult and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." The question as to what age an infant's responsibility is presumed to commence in most cases is not for the jury but for the court. (*Tucker* v. *N. Y. C. R. R. Co.*, 124 N. Y. 308; *Nagle* v. *Allegheny Valley R. Co.*, 88 Penn. St. 35; *Dietrich* v. *Baltimore, etc., R. Co.*, 58 Md. 347), and in the absence of evidence tending to show that an injured infant twelve years of age was not qualified to understand and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed

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sui juris. *Tucker* v. *New York Central, etc., R. Co.*, 124 N. Y 318. In a previous case, the court said, "a child seven years of age is not, as a matter of law, *sui juris* so as to be chargeable with negligence." From the nature of the case, it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, training, habits of life, and surroundings. These, and other circumstances, may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact. *Stone* v. *Dry Dock, etc., R. Co.*, 115 N. Y. 104. The effect of being *non sui juris* is "that the defendant is legally responsible for the injury, notwithstanding the negligence of the infant, unless it appears that the parents or guardian were negligent in permitting the child to be brought into the situation which subjected it to the hazard and resulting injury." *Kuntz* v. *City of Troy*, 104 N. Y. 350. This rule as to imputed negligence of the parents or guardian, must be applied, however, only to cases in which the child itself failed to use that degree of care which would be required from an adult. If it has, in fact, been as free from negligence as an adult would be expected to be, no amount of negligence on the part of its parents or guardian can effect its rights to recover (except, of course, as their acts, in breaking the sequence of events, might affect any other person). The whole theory of imputed negligence rests upon the assumption that the child has acted in a manner which would be negligence, if it had been of full age. Shearman & Redf. Neg. § 79. The evidence shows that the plaintiff had just stepped off the sidewalk to cross avenue A, on the upper side of Fifteenth street. The defendant's truck was on the other side of the avenue, and was going across the street right by the sidewalk; the horses swerved suddenly to the left, and caught the plaintiff just as he was stepping off the sidewalk. The plaintiff tried to recover himself; then the horses struck him, and the wheel went over him. We fail to discover in this any

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carelessness on the part of the plaintiff contributing to the accident, and there can, therefore, be none on the part of his parents or guardian. The plaintiff was lawfully upon the sidewalk at the time, and in the exercise of a legal right when he attempted to cross the avenue, and if the defendant's driver had performed the duty incumbent upon him, of looking out for foot passengers at the crossing, and made reasonable efforts to avoid the plaintiff, the accident would not have happened. Instead of performing this plain duty, and looking out for pedestrians that might be in front of him, the evidence shows that at the time the plaintiff was injured, the defendant's driver was looking behind the wagon, or sideways, and could not have observed the plaintiff. This was certainly a strong circumstance tending to show that the driver was responsible for the accident, and the plaintiff blameless. At all events, the facts were sufficiently strong to require the submission of these questions to the jury.

The plaintiff had the right to presume that the defendant's servant would act with due care, and was not bound to anticipate culpable negligence on his part (Shear. & Redf. on Neg. § 92), and the plaintiff's freedom from contributory fault may be inferred from the absence of all appearance of fault, either positive or negative. Id. § 112. For negligence a relative term depends upon the degree of care necessary in a given case. The defendant contends that even if there was negligence, there is no evidence connecting him with the liability as owner of the truck or employer of the driver. The proofs show that the truck had upon it the name "E. Bauman & Bros., 36 & 38 Avenue C," and this was sufficient to authorize a finding that the truck belonged to a firm doing business under that name at that place, and as ownership of personal property draws to it the possession, it will also be inferred that the driver was in its employ. *Norris* v. *Koehler*, 41 N. Y. 42; *Seaman* v. *Koehler*, 122 id. 646. But the proofs did not even rest there. The fifth paragraph of the complaint alleges that "George Bertell was in charge of defendant's truck at the time of the accident, and was driving the same,"

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and the answer by not denying this allegation admits the truth of it. Code, § 522. In addition to this, the witness Cowan testified that Bertell was driver, and he identified him as the same person who answered to that name in the Police Court when charged with the reckless driving, and whether the defendant owned the truck or not, the fact that his employee, Bertell, had charge of it at the time was sufficient to charge him with liability on the principle of master and servant.

Nonjoiner of the other member of the firm was not pleaded, and if it had been would probably have been unavailing to the defendant in an action for a tortious act. It is difficult, therefore, to discover any ground upon which the action of the trial judge can be sustained.

The dismissal of the complaint was error for which the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN and GILDERSLEEVE, JJ., concur.

Judgment reversed, new trial ordered, costs to abide event.

TOOMEY *v.* DELAWARE, LACKAWANNA, ETC., R. Co.

(New York Superior Court — General Term, January, 1893.)

Plaintiff, and the conductor of the train upon which he was a passenger, got into a dispute as to whether a ticket offered by plaintiff had been punched on that train. At a station in New Jersey, the wrangle was renewed, and plaintiff at the instance of the conductor was arrested under a statute which authorized the arrest and detention of any person who attempts to travel in a carriage of any railroad company without having paid his fare and with intent to avoid payment thereof. Plaintiff had a verdict for six cents. *Held*, that as the trouble had its origin in an honest mistake, of which plaintiff was the responsible author, and the conductor acted without malice or evil intent, the verdict should not be set aside on ground of inadequate damages.

APPEAL by plaintiff from a judgment entered on a verdict in his favor, upon the ground of inadequate damages, and from an order denying a motion for a new trial.

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Robert Sewell, for plaintiff (appellant).

Hamilton Odell, for defendant (respondent).

McAdam, J. On September 27, 1890, the plaintiff purchased an excursion ticket over defendant's road from Barclay street, New York, to Orange, New Jersey. The ticket was in two colors, the white end running from New York to Orange, and the red end from Orange to New York. The plaintiff left the train at Brick Church, before reaching Orange, and some hours later took a train at Brick Church to return to New York. The assistant conductor of the incoming train asked the plaintiff for his ticket, and the plaintiff handed him a red ticket, which was punched and returned to him. Before reaching Hoboken, plaintiff was asked to surrender his ticket, and offered the conductor a white ticket, which had been punched with a punch not in use on that train. The conductor refused to accept the ticket, and a dispute followed, of which conflicting versions are given by the different witnesses. A statute of New Jersey authorizes the arrest and detention of any person who attempts to travel in a carriage of any railroad company without having paid his fare and with intent to avoid payment thereof. The offender forfeits to the company a sum not exceeding five dollars, which "fine" may be imposed "by any justice of the peace before whom such person shall be brought on complaint made on oath or affirmation, and after a summary hearing of the facts and circumstances."

When the train reached Hoboken there was another wrangle. The conductor tried to convince the plaintiff and his friends that they were mistaken in saying that the white ticket with the "spade" punch mark had been punched on his train, but there was an indisposition to listen. The defendant's night despatcher called a police officer and requested him to take the plaintiff in custody. The plaintiff was taken to the police station, a distance of from 500 to 700 feet, where he and his two friends were arraigned before the captain of police, and after a delay of about five minutes were taken before the recorder of Hoboken in the same building.

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No written or sworn complaint was made. No oath was administered to the conductor or to the defendants.

After hearing the conductor's statement the parties were discharged for reasons that were stated by the recorder in his testimony.

The whole affair, from the time the train reached Hoboken, was over in half an hour or less.

The charge made before the recorder was that of violating the state statute before referred to, and the plaintiff was discharged upon the ground that there was no dishonest intention on his part, simply a mistake in getting off one train and going on another. It will be observed that the arrest was by virtue of an express statute, and the trial judge, therefore, properly sent the questions of malice and want of probable cause to the jury, and they found for the plaintiff, assessing his damages at six cents.

There is no precise rule by which damages are to be measured in a case of this character. Much is left to the good sense and discretion of the jury, and the damages when fixed by them in actions of tort, are rarely disturbed, unless so manifestly excessive or inadequate as to indicate bias or prejudice on the part of the jury.

It was evident throughout the trial that the trouble had its origin in an honest mistake, of which the plaintiff was the responsible author; that neither party intended to injure the other, and that what was done from beginning to end was through honest motives, and as a consequence of an innocent but unfortunate error.

In such a case it would indeed be difficult to say that the jury were absolutely bound to give substantial damages, and that a verdict for nominal damages only proved either bias or prejudice on the part of the jury. The result shows that the peculiar circumstances of the case had much to do with the amount of the verdict, and that it evidences the conscientious conclusions of twelve good and lawful men from the vicilage. *Wavle* v. *Wavle*, 9 Hun, 125, was an action of slander. The verdict was for six cents. A new trial was granted by

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the trial court on the ground that the damages were insufficient. On appeal the order granting a new trial was reversed, the court saying:

"The amount of damages to which plaintiff is entitled was not fixed, definite or certain, nor was it capable of being made so by any process of computation. The damages were wholly in the discretion of the jury, and not controlled as to amount by any evidence given upon the trial. The appearance, character and conduct of the parties and witnesses, the probabilities surrounding the transaction, the nature of the slander and the injury done, all constituted elements to be considered by the jury. This has been done with the result seen. Whether such verdict is the result of a compromise of differences among jurors, or whether it expresses the judgment of each juror, we cannot tell. Such results in such cases are within the experience ef every judge. Ordinarily such verdicts are deemed expressions of the jury that each party is more or less in fault, and that neither shall profit thereby. In cases like slander, libel and malicious prosecution, it is well to have an end of litigation as early as possible. Such actions generally involve more of passion than of principle or actual damage. So when such a case has been once fairly tried and considered by a jury, its decision ought generally to be conclusive and final. * * * In the absence of any evidence of dishonesty or misconduct on the part of the jury, we think its verdict ought to stand."

The verdict certainly vindicates the plaintiff, as far as vindication was necessary. It did not attempt to assess the value of his character, which in the general sense of the term was not on trial; but it in effect held that, though filled with honest intentions, the plaintiff had made a mistake, which he failed to make the defendant's conductor properly understand and believe, and the latter, in consequence, was permitted to act upon appearances, and, having done so, without malice or evil intent, the jury were essentially the judges of the amount of compensation which the defendant ought to pay under the circumstances; and there being no merit in the exceptions,

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the judgment and order appealed from must be affirmed, with costs.

GILDERSLEEVE, J. In my opinion, the evidence showed the damages to be substantial and not nominal. Had I been a juror, I should have been in favor of awarding something more than nominal damages. I agree, however, that the measure of damages was entirely within the discretion of the jury. The evidence does not fix with certainty any sum below which the jury would not be warranted in going in making an award. To the authorities on this point, cited by my learned associate, may be added *Henderson* v. *McReynolds*, 38 N. Y. St. Repr. 734.

The jury acted within its province, and its verdict should not be disturbed, for the reason that the court entertains an opinion not in accord with that of the jury on the question of damages. I cannot agree with my learned associate when he says: "It was evident throughout the trial that the trouble had its origin in an honest mistake of which the plaintiff was the responsible author." Under the evidence, the jury were justified in placing the responsibility of the acts that were the inception of the trouble with either party. The evidence leads me to believe they originated with the defendant's servants. I agree in the result reached by my learned associate.

The judgment and order appealed from should be affirmed, with costs.

Judgment affirmed.

CASSIDY *v.* MCFARLAND.

(New York Common Pleas — General Term, December, 1892.)

Where it appears to the satisfaction of the court that the trial of an action will involve the examination of a long account and that no difficult questions of law will arise on the trial, it may, on its own motion, refer the action.

The proof of work done and materials furnished in mechanic's lien cases where the answer denies all the allegations of the complaint always involves the examination of a long account.

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APPEAL from an order made at the Special Term referring the issues in an action to foreclose a mechanic's lien.

Geo. A. Stearns, for defendant Wood (appellant).

Oscar Frisbie, for defendant McFarland (appellant).

Thomas C. Ennever, for respondent.

DALY, Ch. J. The order appealed from recites substantially, that the cause coming on for trial regularly in due course, upon reading the complaint and answers of the defendants, Wood, Snape, McFarland, Orlofski and Comet, and the reply of the plaintiffs, and it appearing therefrom to the satisfaction of the court that the trial of the action will involve the examination of a long account and that no difficult questions of law will arise on the trial, the court, upon its own motion, refers the action to a sole referee to hear, try and determine the issues raised by the pleadings.

The Code expressly authorized the court, upon its own motion, in a proper case, to refer the whole issue or any of the issues. Code, § 1013. If the pleadings show that the examination of a long account is involved, no other proof is necessary. *Holmes* v. *Bennett*, 28 How. 289. No proof is necessary that the trial will not require the examination of difficult questions of law; that will be presumed, and it is for the party opposing the reference to make it appear otherwise. *Barber* v. *Cromwell*, 10 How. 351; *Dewey* v. *Field*, 13 id. 437; *Patterson* v. *Stettauer*, 39 N. Y. Super. Ct. 413.

The pleadings show that the trial will involve the examination of a long account. The complaint disclosed that the action is to foreclose a mechanic's lien for certain plumbing and gasfitting materials sold and delivered by the plaintiffs to Gorman and Sylvander to be used in the course of the erection of three buildings in the city of New York, and it is alleged that the amount and value of the materials is $4,382.30, no part of which has been paid except $375, and that there is now due $4,007.30 with interest, and that the last item of said

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materials was furnished and delivered within ninety days prior to the filing of the lien. All these allegations are denied by the answers of the appellants, and it was manifest that the plaintiffs would have to prove the sale and delivery of all the items of materials for which they claim.

A reference may be ordered where several items of goods sold and delivered must be proved. This involves the examination of an account (*Welsh* v. *Darragh*, 52 N. Y. 590); and so where the items of work done and materials furnished by a contractor will be the subject of inquiry. *Kingsley* v. *City of Brooklyn*, 1 Abb. N. C. 108. The items of the plaintiffs' claim were manifestly numerous as they amounted to $4,382.30 and were used in the course of the erection of three buildings and were delivered at different times, as is to be inferred from the complaint. The proof of work done and materials furnished in mechanic's lien cases under allegations such as are contained in the pleadings before us always involves the examination of a long account, as experience has fully proved.

It is urged, however, that the complaint sets up a cause of action upon a special agreement. It alleges "that the amount and value of materials so furnished is the sum of $4,382.30, which amount said Gorman and Sylvander agreed to pay the plaintiffs therefor." There may be two causes of action thus alleged, one for the value of the materials and the other upon a special agreement to pay the value. If so, the defendants might have called upon the plaintiffs to elect upon which of the causes of action they would proceed (*Gardner* v. *Locke*, 2 Civ. Pro. Rep. 252), and failing to do so, the plaintiffs would have the right to do so and recover upon the *quantum meruit*. If, however, there be but one cause of action alleged, then that is upon the *quantum meruit*. There is no allegation of a contract for an agreed price before the delivery of the goods or performance of the work, as in *Evans* v. *Kalbfleisch*, 16 Abb. (N. S.) 13, where it was held that a single cause of action only was stated, although, after a special agreement was set out, there was an allegation of value; the court holding that

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the alleged *quantum meruit* was but a continuation of the preceding averment pertaining to the special contract, and not in any proper sense the allegation of a separate or different cause of action.

In the complaint before us, there is no averment of a special contract, *i. e.*, an agreement by which the price to be paid for the work, labor or materials, was fixed or agreed upon in advance of performance or delivery. After the averment of the amount and value of the goods, there is the addition of an allegation that the defendants agreed to pay the amount, but this clearly implies a promise subsequent to performance, and this is no more than the agreement which the law implies. To recover upon such a promise, it would be necessary to show consideration in the delivery of the goods, or part of them, upon the request of the defendant. This would require proof of the account to some extent, and in such a case the "examination brings the case within the reasons for referring actions." *Welsh* v. *Darragh*, 52 N. Y. 590. None of the authorities cited by appellants conflicts with these views.

But not only would plaintiffs be required under the pleadings to prove the items of their own account for materials furnished to Gorman and Sylvander, but they were also bound to prove the items of work done and materials furnished by the latter to the defendant Frederick Wood, who was the principal contractor, with the owner, Joseph McFarland, and under whose contract the plaintiffs supplied the materials for which they filed their lien. The complaint alleges that Gorman and Sylvander were to do the plumbing and gasfitting for the buildings, and that Wood was to pay them therefor a sum in excess of $4,007.30, and that they commenced to work thereunder and completed the same, and that there remained due and owing them a sum in excess of said last-named amount. These allegations are denied by the defendant Frederick Wood.

It was also manifest from the pleadings that the plaintiffs were bound to prove the performance by Frederick Wood of his contract with McFarland, the owner, and an examination of the accounts between Wood and McFarland was necessary

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to show that a sum sufficient to satisfy the plaintiff's lien was due from the owner at the time of the filing thereof. The complaint alleged that Wood agreed to erect and did erect the buildings, and that there became due from McFarland at the time of the filing of the lien a sum in excess of $4,007.30. This allegation was put in issue not only by the answer of the owner, McFarland, but also by the answer of Wood, the contractor. It thus appears that the plaintiffs, in order to maintain their lien, would be compelled, under the pleadings, to prove performance of no less than three contracts for work, labor and services and the furnishing of materials, and this would involve proof of items not only on one account but several, and the reference ordered was eminently proper and should be affirmed.

With respect to the motion by respondent to dismiss the appeals, it appears that the papers were printed in time for the argument, and it is customary to relieve appellants from their default in such cases, upon terms. The motion to dismiss the appeal on the ground of waiver must be denied. The appellants proceeded before the referee after having first made formal objection to going on with the reference. The case is thus distinguishable from *Ursdell* v. *Root*, 3 Abb. Pr. 142.

The motion to dismiss the appeals is denied. Order appealed from affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Order affirmed.

Fanning *v.* Fanning.

(New York Common Pleas — General Term, December, 1892.)

Evidence considered and held insufficient to establish the fact of adultery necessary to authorize a decree of divorce.

Appeal from judgment at Special Term, granting a divorce to plaintiff for the alleged adultery of the defendant.

Wm. G. McCrae, for defendant (appellant).

A. G. Cropsey, for plaintiff (respondent).

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PRYOR, J. Before proceeding to an examination of the evidence on which this judgment depends, it is requisite to recall the interest of the state in the litigation, and to ascertain the degree of proof necessary to a decree of divorce.

"A suit for divorce, although on the face of the record a mere controversy between two private parties, is in truth, a triangular proceeding, *sui generis*, in which the government or public occupy the position of a third party. * * * What the government does is: 1. To protect the rights of persons not before the court, but liable to be affected by the decree or sentence; 2. To guard the interests of the public as to its morals; and 3, and chiefly, To see that the status of its subjects, who are parties of record, and sometimes their children, is properly determined or established." 2 Bish. Marr. and Div. (6th ed.) §§ 230, 231. It follows, therefore, that it is the duty of the court as representative of the state, to see that the interests of the public and of persons not parties to the record, *e. g.*, children, are not sacrificed or compromised by a sentence of divorce rendered contrary to law or justice. *Richardson* v. *Richardson*, 30 Am. Dec. Note 544 *et seq.* Hence, in divorce cases the courts have prescribed a mode and measure of proof different from that which suffices for decision in other litigations. Thus, a sentence of divorce will not be granted by default (Rule 37, General Rules of Practice); nor "be given upon the sole confessions of the parties" (*Lynde* v. *Lynde*, 2 Barb. Ch. 72), nor upon "the uncorroborated evidence of prostitutes and private detectives" (*Moller* v. *Moller*, 115 N. Y. 466); nor is the testimony of a party competent evidence of the fact of adultery. Code, § 831. It is settled also, that "although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt" (*Pollock* v. *Pollock*, 71 N. Y. 137); and that "a divorce should not be granted without evidence which is, after careful scrutiny, satisfactory

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and can command the confidence of a careful, prudent and cautious judge." *Moller* v. *Moller*, 115 N. Y. 466.

With these rules for our guidance, we proceed to inquire, whether the evidence upon which the judgment under review was rendered, be sufficient in law to sustain it.

But a single act of adultery is charged; and that is made probable by no evidence of carnal inclination, or significant familiarities, between the defendant and the alleged paramour. The fact, if it be such, stands alone; without antecedant, or concomitant, or subsequent circumstance of corroboration. Moreover, but one witness testified to the adultery, and that witness was not only the mother of the plaintiff, but manifestly inflamed with the fiercest animosity against the defendant. Plainly, the evidence in support of the fact, challenges the most jealous and suspicious scrutiny.

Now what was that evidence? The summary in the respondent's brief gives it with all possible effect:

"The respondent's witness, Mrs. Doyle, testified that at about half-past eight o'clock in the evening of about Decoration Day, 1891, she saw the appellant in his store on Railroad avenue near One Hundred and Seventieth street in the act of putting out the lights, and that about three-quarters of an hour after the lights had been put out she saw a woman come out of the rear of the same store and go towards the lots towards the rear; that she knew such woman was not the respondent; that shortly thereafter she saw appellant locking the door of the same store when his pants were not fastened up, his necktie was undone, and his vest was unbuttoned with the exception of these buttons; that this witness then and there reprimanded the appellant for his having been found in such a predicament as he appeared to be in, whereupon he said to the witness, 'I was locked up in the store with a woman, and it is none of your damned business. Now go and find out who it was.'"

It should be remarked that the things the witness professes to have seen, she observed at night, and from a distance of twenty or twenty-five feet.

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The story of plaintiff's witness was flatly contradicted. The defendant testified: "I had no woman in my store that night. No other woman than my wife was in my store on the night I am charged with having committed adultery. I did not have sexual intercourse with any woman in that store that night, or any other place. Not that night or any other night. I have not committed adultery with any one. When I came out of that store my clothes were not open or disarranged. They were just the same as they are now, only I did not have so much clothes on. I did not admit to my wife's mother, or to my wife, that night, that I had a woman in my store. I told my wife's mother at the hydrant, where I was getting my wife a bottle of sarsaparilla that she wanted out of the store, that she was as big a fool as the daughter was. That was all the conversation I had. They ordered me out of the house, and I went."

Mrs. Gahan, apparently a disinterested witness, testified: "I was sewing, and I heard glass break, and I put my needle into the work and jumped from the table and ran to the door and opened it; as I opened the door I saw Mrs. Fanning fly past my door from the rear portion of the house. Q. Where did she go? A. Went to the store door, where Mr. Fanning stood, and accused him of having a woman there. Mr. Fanning told her to go in and see, and she declined to go in. She grabbed him by the face and called him a 'dirty loafer,' and says 'if you ever come into my house again, I will shoot you.' They both started from the store door down to the corner, whether they separated or not, I could not say. There was nothing about Mr. Fanning at that time to attract my attention. I could not tell which way he was dressed. I stood in my door, and his door was about twenty-five feet from me. I saw him, and he looked about the same as the time he came home in the afternoon with feed. She was in the store the time he came with the feed, and gave him a scolding. I did not see any woman, or anybody else. That was Mrs. Fanning I saw coming from the rear part of the store."

Upon due consideration we are unable to avoid the impres-

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sion that the evidence is altogether insufficient to establish the fact of adultery. It falls short of the measure of proof prescribed by courts as necessary to authorize a decree of divorce.

We have said that the adultery is shown by but a single witness; not so, however. The plaintiff herself was allowed to give evidence of the fact. "I saw him let the woman out of the back door" — a pregnant circumstance, if true, in corroboration of her only witness, and in contradiction of the witnesses for the defense. True the evidence was received without objection, but it was incompetent evidence, and as guardian of the interests of the public and persons not parties to the record, it is our imperative duty to prevent the dissolution of the marriage relation by means which the law condemns and expressly forbids.

An infant child is issue of this marriage, and we cannot tolerate that its character shall be sullied and its career clouded by a judicial conviction of the father on such evidence of infidelity to the most sacred of obligations. Since the "common-law marriages," so called — another name for concubinage — is obstrusively prevalent in the community, and our calendars are crowded with applications for divorce, it behooves us not to relax the stringency of the rules which, in the interest of good morals and social security, have been prescribed by law for the safeguard of the sanctity and stability of the marriage relation.

The judgment is reversed and a new trial ordered.

Daly, Ch. J., and Bischoff, J., concur.

Judgment reversed, new trial ordered.

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Fitch *v.* Kennard.

(New York Common Pleas — General Term, December, 1892.)

Pending an offer made on March eighteenth, in Chicago, for the sale of a car load of eggs by a seller to an intending buyer, the seller represented that the eggs were then in car, and would be shipped that evening so as to be delivered in New York in due time; and upon the faith of such assurance plaintiff bought and paid for the eggs. The shipment was not made until March nineteenth. In an action to recover damages for breach of contract, *held*, that defendants were liable.

The contract of sale and purchase was made by one D., an employee of the firm of brokers who negotiated the sale. When defendant and other witnesses were asked to give the conversation at the time of the making of the contract between defendants and D., the evidence was rejected on the ground that D. was defendants' agent, and that they were concluded by his testimony. *Held*, that assuming that he was defendants' agent, although the undisputed evidence showed that he was plaintiffs' agent, defendants had a right to contradict D.'s version of the transaction, and the exclusion of the evidence was error calling for reversal.

Appeal from judgment of the General Term of the City Court affirming a judgment on a verdict. The opinion states the case.

Abraham Gruber, for defendants (appellants).

J. George Flammer, for plaintiffs (respondents).

Pryor, J. The action is for damages from breach of an alleged contract by defendants to ship a cargo of eggs in Chicago, on the night of the 18th of March, 1891, to the plaintiffs in New York. The shipment was not made until the nineteenth of March.

The single question in controversy is: Did the defendants agree to ship the eggs on the night of the eighteenth of March?

By the plaintiffs' own evidence it appears that the broker negotiated the sale on the eighteenth of March and consummated it on the nineteenth. Indeed, it is not apparent how the sale could have been made on the eighteenth, seeing that it was not until the nineteenth that the plaintiffs gave the

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broker authority to accept the defendants' offer, *i. e.*, to buy; and that it was not until the nineteenth that he communicated his authority to the defendants, the sellers. The "purchase ticket," *i. e.*, the contract of sale, executed by the broker and given to the defendants, was not so executed and delivered until the nineteenth. Assuming, then, an agreement to ship on the eighteenth, that agreement was necessarily provisional, and dependent on the consummation of the sale; and since the sale was not, in fact, consummated till the nineteenth, without more, there could have been no binding agreement to ship on the eighteenth. Suppose that after the negotiation on the eighteenth, and the then agreement to ship that night, the sale had gone off, would the plaintiffs have had a claim of damages against the defendants for failure to ship on the eighteenth? After the miscarriage of the sale, plaintiffs could have had no right to the possession of the eggs, and defendants could have been under no obligation to ship on the eighteenth or at any other time. Whatever "understanding," therefore, may have existed between the parties to ship on the eighteenth, was necessarily canceled by the failure to consummate the sale until the nineteenth.

But upon all the evidence the case presents another aspect and warrants a different conclusion.

The broker testifies in behalf of the plaintiffs that the defendants represented that the eggs would be shipped that evening (the eighteenth), "whether we bought or not," and that he consummated the sale on the nineteenth, "with the understanding that the car was then in transit." The case, then, is this: Pending defendants' offer to the intending buyers, they represented that the eggs were then in car, and would be shipped that evening (the eighteenth of March), so as to be delivered in New York "in due time," and upon the faith of that assurance the plaintiffs bought and paid for the eggs. We are of opinion that the representation so replied and acted on constitutes an agreement, for infraction of which the defendants there are responsible in damages to the plaintiffs. *Hawkins* v. *Pemberton*, 51 N. Y. 198.

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But appellants impeach the judgment for error as well in the exclusion as in the admission of evidence.

The contract of sale and purchase was negotiated by Davis & Company, of whom one Dodd was an employee, and who, in fact, made the contract. The issue in the case, we repeat, was whether the defendants agreed to ship the eggs on the eighteenth, and surely, under their denial, they were at liberty to controvert the evidence of the plaintiffs and disprove the alleged agreement. Nevertheless, when the defendant Kennard and other witnesses were asked to give the conversation at the time of the contract of sale between the defendants and Dodd, the evidence was rejected, and upon the ground that Dodd was the agent of the defendants, and that so they were concluded by his testimony. It is our opinion that on the undisputed evidence, Dodd was the broker of the plaintiffs and that the defendants negotiated with him for themselves, but assume otherwise, and still it is clear to demonstration that defendants had a right to contradict Dodd's version of the transaction. If the broker of the defendants they were not bound by his testimony, nay, not even had he appeared as their witness. The law is not so unjust as to sacrifice a principal to the perjury of his agent, when the principal has in his hands the means of exposing the perjury. It will not avail on an appeal, as thought the General Term of the court below, to argue that the questions were too general, or that the offer was to show an inconsistent statement by Dodd without affording him a previous opportunity of explanation.

The exclusion of the evidence in the trial court went upon the sole and specific ground that Dodd was defendants' agent to sell, and upon that ground the evidence must stand or fall in this appellate tribunal, unless the evidence was in no aspect of the case competent, or could not be made so." *Briggs* v. *Wheeler*, 16 Hun, 583 (directly in point) and *Tooley* v. *Bacon*, 70 N. Y. 34, 37. We may add, that the questions could not have been made more definite without leading the witnesses, and that were the objection proper the ruling could not be sus-

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tained upon the authority of *Stracy* v. *Graham*, 14 N. Y. 492, an adjudication in no respect applicable to the point in discussion.

Respondents answer that the contract of sale was in writing, and so was not open to parol contradiction. The "purchase ticket" did probably constitute a contract of sale, but it was not produced or proved in evidence. The telegram of Davis only communicated the offer of defendants to sell a carload of eggs, accompanied with the statement of Davis that they "leave to-night." The bill of lading acknowledged the receipt of the eggs and expressed the terms upon which they were to be carried, but contained no agreement of sale between the sellers and the buyers. We fail to find in the record any written contract of sale.

We incline to the opinion that the court below erred also in the admission of evidence, but we forbear discussion of other exceptions, since the one sustained requires a reversal of the judgment.

Judgment reversed, and a new trial ordered, costs to abide the event.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment reversed, new trial ordered, costs to abide event.

GRAUER *v.* GRAUER.

(New York Common Pleas — General Term, December, 1892.)

In an action for divorce, the husband counterclaimed for a separation; the wife obtained an order awarding her a counsel fee, which on appeal was reversed. Plaintiff gave evidence in opposition to the counterclaim but her complaint was dismissed on her own case. The husband moved *ex parte* for a restitution of the counsel fee which had been paid. *Held*, that the motion should be denied, as no case for restitution had been made; not against the wife, because she was not a party to the proceeding; not against her attorneys, because in legal contemplation the husband had paid them no money, but if he had, no legal duty rested upon them to restore it.

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APPLICATION for restitution of counsel fee paid under order of court, in an action for divorce. The opinion states the case.

Mr. Truax, for the application.

Mr. Kenneson, in opposition.

PRYOR, J. The wife sued the husband for a divorce; the husband counterclaimed for a judicial separation, and in the action an order was made awarding the plaintiff $150 counsel fee. On appeal to the General Term the order was reversed, because the moving papers showed no ground for it.

Upon the order of reversal the defendant now applies to the court for restitution of the counsel fee.

It appears that no notice of the motion has been served on the plaintiff, and that the counsel fee has been partly expended for her benefit in the prosecution of the action and in resistance to the counterclaim. The action was tried, and resulted in a dismissal of the complaint on the plaintiff's own case, but this not until she had given evidence in opposition to the counterclaim. The decree denies a divorce to the plaintiff, without adjudicating the counterclaim, the benefit of which it reserves to the defendant in a future action.

The question whether in an action for divorce the defendant husband may ever claim restitution of a counsel fee paid under order of court, we need not now decide; because upon the facts apparent on the application, no case is presented for such restitution. The counsel fee, no matter to whom actually delivered, was, in legal effect, paid to the wife, and a restitution of it would be restitution by her. Cases, *infra*. But, she has had no notice of this motion; and without her day in court, she cannot be compelled to pay money for any purpose.

The legal effect being, that the wife received the money and disbursed it to her attorneys upon their retainer, they are under no obligation to return it. *Langley* v. *Warner*, 3 N. Y. 327; *Wright* v. *Nostrand*, 53 N. Y. Super. Ct. 381.

The services of the attorneys of the wife, in recompense of

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which the counsel fee was allowed, were rendered, not merely in prosecution of her suit for divorce, but in defense of the husband's cross-suit for judicial separation; and that has not been determined.

Upon the whole we are clearly of opinion that no case for restitution is made; not against the wife, because she is not a party to the proceeding; not against her attorneys, because, in legal contemplation, they have been paid no money by the applicant; but if they have, no legal duty rests upon them to restore it.

Application denied; but without costs, as it was preferred on the suggestion of the court.

DALY, Ch. J., and BISCHOFF, J., concur.

Application denied.

GLOBE YARN MILLS *v.* BILBROUGH.

(New York Common Pleas—General Term, December, 1892.)

The City Court of New York has jurisdiction of an action brought by a foreign corporation against a domestic corporation upon a negotiable instrument, although the cause of action did not arise in the city of New York, and neither of the parties resided there, nor was the summons served therein.

In an action by a foreign corporation upon a promissory note given for goods sold and delivered, one H., who obtained the note from plaintiff's treasurer, to whose order it was payable, and upon H.'s affidavit that the plaintiff was entitled to recover the amount of the note, with interest thereon, over and above all counterclaims and offsets known to the plaintiff or deponent, an attachment was obtained. *Held*, that the affidavit was sufficient.

In granting provisional remedies, the courts do not proceed upon the technical rules of evidence regulating the final determination of rights of parties on a trial, but allow affidavit evidence, dispense with cross-examination, and are content with *prima facie* proof.

Where a motion to vacate an attachment proceeds upon the papers upon which it was granted, plaintiff is entitled to all legitimate inferences from the facts shown.

APPEAL from orders of the General Term of the City Court, affirming orders denying motion to vacate attachments.

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Plaintiff is a foreign corporation. Defendants move on the papers upon which the attachments issued. The opinion gives the necessary facts.

Ira B. Stewart, for defendants (appellants).

Arthur P. Hodgkins, for plaintiff (respondent).

PRYOR, J. The grounds upon which the orders are impugned are, as to action No. 3, that it is beyond the jurisdiction of the court, and no evidence appears to warrant the attachment.

Action No. 3 is on a negotiable note made at Cohoes and payable at Troy. The cause of action did not arise in the city of New York; neither of the parties resides here, nor was the summons served in the city.

Appellants argue that because, upon this condition of fact, the Court of Common Pleas would not have jurisdiction of the action, it is a necessary inference that the City Court also is without jurisdiction. But the conclusion is a *non sequitur*. It may be an anomaly, but it is not a legal impossibility, that the appellate tribunal should not have original jurisdiction of a matter which is within the cognizance of the subordinate court. It is within the power of the legislature to perpetrate a legal solecism; and the question of jurisdiction must be solved by reference to the statute.

Of any action for a sum of money not exceeding $2,000, "against a natural person, or a foreign or domestic corporation," the City Court has jurisdiction. Code, §§ 315, 316. By section 1779, "an action may be maintained by a foreign corporation in like manner and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law." It is not controverted that the City Court has jurisdiction of an action by a domestic corporation, and it is not pretended that any special provision of law restricts the concession of jurisdiction as to foreign corporations. It is not denied that the defendants are resident in the state of New York, nor that the sum-

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mons was duly served upon them pursuant to section 3170 of the Code. Upon this state of fact there is no escape from the conclusion that the court below has jurisdiction of the action.

In defeat of the attachments in all the actions, the appellants contend that the affidavit is insufficient, in not showing by competent and adequate evidence that "the plaintiff is entitled to a sum stated therein, over and above all counterclaims known to him." Code, § 636. The affidavit is in three actions, is made by the same person, and touching the point in question, is as follows: "The plaintiff is entitled to recover the amount of the note" (in action No. 3), "of the draft" (in actions Nos. 1 and 2) "with interest thereon, over and above all counterclaims and offsets, known to the plaintiff or deponent." It is observed that, as to counterclaims and offsets, the affirmation is positive and absolute, not upon information and belief; and appellants' contention is, that "it is not shown that the affiant has any knowledge of the plaintiff's business, general or specific, or any connection therewith, and, therefore, his positive statement as to no counterclaim or offset can have no weight."

The statute does not require an affidavit that there are no counterclaims; but only that there are none known to the plaintiff. The statement of the affiant as to his own knowledge is, of course, free from criticism; but, not his knowledge but the knowledge of the plaintiff is in controversy. The plaintiff, being a corporation, can have no knowledge; and, therefore, the question is as to the knowledge of officers most likely to be informed as to the corporate liabilities.

The instruments in suit, were given for goods sold by the plaintiff to the defendants, and so of themselves import an absence of any counterclaim. It is common knowledge that in the transactions of trade, buyers usually give notes or drafts only for the balance of account; and the presumption thus arising from the general course of business between mercantile men, afforded the affiant some ground, not of belief, only, but of knowledge, that no counterclaim existed against the debt in action. Furthermore, the affiant got the instru-

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ments from the plaintiff's treasurer, to whose order, indeed, they were payable; that officer is presumed to be familiar with the financial condition of the plaintiff; and hence, here is another avenue of intelligence by which the affiant might have come to know if any counterclaim existed against the plaintiff's demand.

Having the means of knowledge, and deposing positively to the fact, the inference is that the affiant had knowledge of the fact.

Since, then it is only in case the affiant could not have had knowledge of the fact, that his positive affirmation is insufficient and inadmissible, and as here he might have known the fact in the sense that all save pedants employ the word, namely, a conviction of a fact upon satisfactory evidence — have known it in the only way possible to ascertain that no counterclaim existed, that is, by a process of inquiry and inference, we hold the affidavits to be competent and adequate to sustain the orders.

The statute is remedial, and should not be nullified by a literal construction. Upon such construction a corporation plaintiff could never obtain an attachment; for a corporation is incapable of knowledge. Upon such construction an affidavit by plaintiff's treasurer even, would not suffice, for he cannot be supposed to know but that upon matter subsequent to a sale a counterclaim may not have arisen, as for breach of warranty, or some other agreement, express or implied, of the corporation. In granting provisional remedies courts do not proceed upon the technical rules of evidence regulating the final determination of the rights of parties on a trial. They allow affidavit evidence; they dispense with cross-examination; they are content with *prima facie* proof. If from the evidence before them an inference of the requisite fact may be drawn sufficiently cogent to satisfy their judgment, it is enough to authorize the order. Code, § 636.

The proposition upon which this opinion preceeds, is sustained by the authorities cited by the appellants themselves. "The true rule is, that the statements in affidavits will be presumed

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to be made on personal knowledge except where it appears affirmatively or by fair inference that they could not have been, and were not made on such knowledge." VAN BRUNT, P. J., in *Crowns* v. *Vail*, 51 Hun, 205. "An affidavit by an agent must contain something to enable the court to see how he did or could know the facts, or which showed that the relations between him and the plaintiff to be such as to raise a presumption that he might have personal knowledge as to the fact. The provisions of the statute must be substantially observed. *Buhl* v. *Ball*, 41 Hun, 61, 64. "The witness will not be allowed to testify to a fact positively, when it is plain he can have no actual knowledge on the subject." *Ellison* v. *Bernstein*, 60 How. 145. "An affidavit for attachment made by the president of plaintiff's bank averring that there are no counterclaims within his knowledge to the demand sued on, is sufficient without showing that the affiant had knowledge of all the transactions between plaintiff and defendant out of which counterclaims might have arisen." *Essex Bank* v. *Johnson*, 16 N. Y. Supp. 71, General Term Supreme Court, first department. "It is not necessary now, in order to secure the benefit of the provisional remedy of attachment, to do more than establish a *prima facie* case, and this is accomplished when upon all the allegations the court can perceive on sufficient proof that a demand is due over and above all counterclaims." *Lee* v. *La Compagnie*, 2 N. Y. St. Repr. 612, General Term first department, Supreme Court.

The motion to vacate the attachments proceeded upon the papers on which they issued. Thus, none of the allegations in those papers being denied, the plaintiff, in support of the orders, is entitled to the benefit of all legitimate inferences from the facts shown, *i. e.*, that no counterclaim exists against the demand in suit.

Orders affirmed, with costs and disbursements.

DALY, Ch. J., and BISCHOFF, J., concur.

Order affirmed.

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Runt *v.* Herring.

(New York Common Pleas — General Term, December, 1892.)

Whether a servant may by contract exonerate his master from liability for an injury inflicted by the latter's own negligence, *quære.*

Plaintiff, in consideration of his employment by defendants, agreed "that in the event of his receiving any personal injury, accidental or otherwise, not to make any claim for money damages or institute or appear as a witness in any suit or proceeding," nor to "countenance or authorize any person to sue or appear and give testimony in any suit claiming damages for injuries." In an action to recover for injuries received by defendants' negligent omission to provide plaintiff a safe working place, the agreement was received in evidence. *Held*, that the agreement was against public policy and void, and its reception in evidence under objection error.

Defendants contended that plaintiff's stipulation to forego his claim against the defendants might be held valid and operative, although his engagement not to sue or give testimony in the courts might be illegal and ineffectual. *Held*, that the contention was untenable; the agreement being void in part was void as a whole.

Appeal from a judgment on a verdict.

Action for injury to plaintiff by the defendants' negligence. The opinion states the case.

Leopold Leo, for plaintiff (appellant).

J. A. Shoudy, for defendants (respondents).

Pryor, J. The case is before us on a single exception, and with only so much of the evidence as is requisite to show the point and pertinency of that exception.

On the 19th of January, 1885, the plaintiff, being in the service of the defendants, but for no definite time, signed the following paper:

"For and in consideration of employment and one dollar in hand paid to me by Herring & Co., I hereby agree that in the event of my receiving any personal injury, accidental or otherwise, whether from the fault of other employees or machinery, belting, boilers, engines, trucks, defects of buildings, or from any other cause whatever, I will not hold Herring

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& Co., or any member of said firm responsible, or make any claim for money damages or institute or appear as a witness in any suit or proceedings. Neither will I countenance or authorize any other person to sue or appear and give testimony in any suit claiming damages for injuries received as above stated.

"B. RUNT."

Thereafter, upon an allegation that on the 20th of November, 1888, he had sustained an injury by the negligent omission of the defendants to provide him a safe working place, the plaintiff sued them in an action for damages, and, besides denying the imputed negligence and attributing contributory negligence to the plaintiff, the defendants pleaded the above paper in bar of the action. On the trial and as special matter of defense, the defendants offered the paper in evidence; the plaintiff objected to its introduction on the grounds that it was irrelevant, immaterial and incompetent, and a void instrument, because without consideration and contrary to public policy. Nevertheless the court admitted it in evidence, and it was marked "Defendant's Exhibit No. 1," to which ruling the plaintiff duly excepted. The reception of this paper as evidence in the cause is the error and the only error of which the plaintiff complains.

The recital of the employment and the dollar paid distinguishes the case from *Purdy* v. *Rome, etc., R. Co.*, 125 N. Y. 209, and probably discloses a sufficient consideration to sustain the agreement. Nevertheless, we are of opinion that the paper was a nullity; and if so, it was irrelevant and immaterial, because ineffectual as a defense to the action.

The action proceeds upon an allegation of the defendants' own negligence; since the careless omission of the master to provide a safe working place for the servant, is the breach of a duty incumbent upon him, and from the obligation of which he cannot escape by delegation to an agent.

Whether a servant may by contract exonerate the master from liability for an injury inflicted by his own negligence, is *quaestio vexata* in the jurisprudence of England and this country. The following cases support the affirmative of the

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proposition: *Griffiths* v. *Earl Dudley*, 9 Q. B. D. 357; *Western, etc., R. R. Co.* v. *Bishop*, 50 Ga. 465; *Western, etc., R. R. Co.* v. *Strong*, 52 id. 461; *Galloway* v. *Western, etc., R. R. Co.*, 57 id. 512. The great weight of American authority, however, is distinctly to the contrary. *Roesner* v. *Hermann*, 8 Fed. Rep. 782; *Little Rock, etc., S. R. Co.*, 44 Ohio St. 471; *Kansas Pac. R. R. Co.* v. *Peavey*, 29 Kan. 169; *Memphis, etc., R. R. Co.* v. *Jones*, 2 Head. 517; *R. R. Co.* v. *Spangle*, 44 Ohio St. 471; *Willis* v. *Grand Trunk R. Co.*, 62 Me. 488; Greenhood on Public Policy, 528; *Purdy* v. *Rome, etc., R. Co.*, 125 N. Y. 209, 214, *obiter dictum* by PECKHAM, J.

However this may be, still the agreement under criticism is void, upon grounds of public policy. For an entire and indivisible consideration, the plaintiff stipulates "not to institute or appear as a witness in any suit or proceeding," nor to "countenance or authorize any person to sue or appear and give testimony in any suit claiming damages for injuries." It is familiar learning that the courts will not tolerate an agreement to oust them of jurisdiction, and "a contract to prevent the performance of a duty imposed by law, and in the performance of which the state has an interest, is in contravention of public policy and, therefore, void." *James* v. *Hendrees*, 34 Ala. 488. No duty upon a citizen can be more obligatory or of greater interest to the state than to be obedient to the process of the courts and instrumental, as a witness, in the administration of justice. "It is an established general principle that contracts having for their subject-matter any interference with the due enforcement of the laws are against public policy and are, therefore, void. The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration." 13 Am. St. Rep. note; *Ormerod* v. *Dearman*, 100 Penn. St. 561.

It is insisted, however, that here the stipulation of the plaintiff to forego his claim against the defendants may be

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valid and operative, although his engagement not to sue or give testimony in the courts be illegal and ineffectual. The contention is untenable. "If any part of a consideration is illegal, the whole contract is void as against public policy, even though the illegal act or promise is coupled with one that is legal" (*McNamara* v. *Gargett*, 65 Mich. 454), for illegal contracts cannot be divided and held valid in part and invalid in other parts." *Santa Clara Valley, etc., Co.* v. *Hayes*, 76 Cal. 387.

The respondent urges, however, that "whether its provisions were binding or not, the contract was certainly admissible in evidence as the agreement under which plaintiff's services were rendered." But, surely, the agreement is fallacious, in assuming that a thing which in law is no agreement, may still be an agreement between the parties, with the effect of controlling their rights and remedies. A nullity is inoperative for any and all purposes; and when an apparent contract is avoided for repugnancy to public policy, it may not, without absurd inconsistency, be employed as an instrument of legal evidence.

Assuming that the admission of the paper was error, respondent contends that it was of no prejudice to the plaintiff, because "no question in respect thereto was submitted to the jury," and because "the court refused to submit it to the jury, or to give it any effect whatever." We do not so read the record. Against plaintiff's objection, the court received the paper in evidence; that ruling imports that it was read to the jury, and by them considered; and this presumption is repelled by nothing in the case. It is of no avail to the respondent that reference was not made to the paper in the general charge by the court, nor that the court refused to charge that because of the paper the plaintiff could not recover. The paper was not withdrawn from evidence, nor did the court instruct the jury to exclude it from consideration, or tell them that it was not a defense to plaintiff's recovery. The mere fact that the court refused to rule it to be a peremptory bar to the action, still left the jury free to attach the utmost importance to it as

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evidence against the plaintiff. And, doubtless, this effect it had on their decision; for, privileged by the court to weigh the paper as evidence, they naturally held the plaintiff to a deliberate agreement, in consideration of his employment, to release the defendant from liability to him for any injury in that employment.

Again, the respondent argues that the error in the admission of the paper was of no detriment to the appellant, because "the case does not contain a particle of evidence tending to show that the plaintiff had any cause of action whatever against the defendant." But, the submission of the case to the jury, itself imports an apparent right of recovery on the evidence; and, indeed, in its charge, the court expressly instructed the jury that the plaintiff's evidence, if believed, and not overborne, authorized a verdict in his behalf, for the cause of action exhibited by the complaint.

The conclusion is that, for the error indicated, the judgment should be reversed.

Judgment reversed, and a new trial ordered, costs to abide the event.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment reversed, new trial ordered, costs to abide event.

NICHOLAS *v.* VENABLE.

(New York Common Pleas — General Term, December, 1892.)

In an action to recover the purchase price of goods sold and delivered, it appeared that after the date when, under the contract, the goods should have been delivered, they were shipped at defendants' request, received, accepted and retained by them without objection as to tardy arrival. *Held*, that defendants had waived the default in delivery, and were estopped from setting up the belated delivery as a defense.

APPEAL from judgment on a verdict directed by the court, and from an order denying a new trial.

Action for goods sold and delivered. The opinion states the case.

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I. Albert Englehart, for defendants (appellants).

J. Hampden Dougherty, for plaintiff (respondent).

PRYOR, J. The plaintiff sues, as assignee, to recover the purchase price of goods sold and delivered to the defendants. The only answer to the action involved in the appeal is, that by the contract of sale the goods were to be shipped "at the earliest possible time, so as to arrive before September 1, 1890;" that they were not so shipped and did not so arrive, and this breach of agreement the defendants allege both in defense of the action and as a counterclaim for damages.

But it appears, without contradiction, that on the 12th and 27th of September, 1890 — after the date when, according to the answer, the goods should have been delivered — the defendants telegraphed the assignors to ship the goods; that after the delivery of the goods the defendants sent the assignors an acknowledgment of their receipt, expressed satisfaction with them, and retained them without hint of objection to their tardy arrival; that on December sixteenth the defendants apprised the assignors that, "owing to the stringency of money and inability to place our commercial paper," they had become insolvent, and suggested a settlement of the claim, but without question as to its validity or amount; that again, on January 9, 1891, they wrote the assignors, "we have scheduled your claim at $2,638.70" — covering its entire amount — and solicited the assignors to unite with other creditors in a composition at fifty cents on the dollar. These offers being rejected, and the assignors driven to an action to collect their debts, the defendants, for the first time, interpose the objection that the goods were not delivered within the stipulated period. The fact that after the alleged time of shipment and delivery had elapsed, the goods were sent at the special instance and request of the defendants, operated of itself as an estoppel against the defense of a belated delivery. At all events, that fact, coupled with the acceptance, approval and retention of the goods, without objection as to the time of delivery, and with the negotiation for a compromise of the

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claim proceeding on an express admission of its validity and amount, clearly and conclusively demonstrates a waiver of the right to defend the action on the ground that the goods were not delivered in conformity with the contract.

Appellants argue, however, that for anything apparent they might have shown that, by the contract they proposed but were not permitted to prove, an acceptance of the goods was not to operate as a waiver of default in delivery. But, the waiver is founded not alone on the acceptance, but independently and conclusively on the other facts recited as precluding the defense of no due delivery. Again, the answer is not a mere denial of the contract alleged by the plaintiff, but affirmatively avers another agreement between the parties, and of the agreement so averred, it is not a term that acceptance shall not waive default in delivery.

It follows, therefore, that the learned trial judge rightly rejected evidence, if indeed it were tendered, of a condition in the contract that acceptance of the goods should not operate a waiver of undue delivery, and rightly directed a verdict for the plaintiff.

Further discussion of a case so plain both on the law and the facts, would be but a useless expenditure of time and labor.

Judgment affirmed, with costs.

Daly, Ch. J., and Bischoff, J., concur.

Judgment affirmed.

The Home Maker Co. *v.* Alley.

(New York Common Pleas — General Term, December, 1892.)

In an action to recover damages resulting from a single act, the detention and refusal to mail magazines to plaintiff's subscribers and advertisers, defendant is not entitled to a bill of particulars.

Appeal from order denying motion for bill of particulars.

John C. Gulick, for defendant (appellant).

Joseph Fitch, for plaintiff (respondent).

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PRYOR, J. For cause of action the complaint alleges that defendant neglected and refused to mail the March number of plaintiff's magazine to subscribers and advertisers, and wrongfully held and retained the mailing list and the edition of said magazine; to his damage $2,500. Defendant wants to know how much plaintiff was damaged; 1, by failure to mail to subscribers; 2, by failure to mail to advertisers; 3, by detention of the mailing list; and 4, by detention of the edition. This information the learned judge at Special Term refused to require the plaintiff to furnish. The order appealed from is correct beyond controversy.

Essentially a single act, the detention of the magazine, is alleged as the cause of action, and the claim is for damages resulting from that act. By the motion the defendant requires of the plaintiff to resolve the damage ensuing from the tort into constitutive elements, and to propound them by a distinct classification; as in assault and battery, to state separately and specifically to what amount the plaintiff is injured in his eyes, in his nose and in his abdomen. The contention is preposterous. Plainly the attempt is to force a premature disclosure of plaintiff's proof of damage; but this is never allowable. *Passavant* v. *Cantor*, 48 Hun, 546; *Higenbotam* v. *Green*, 25 id. 214, 216; *Ball* v. *Evening Post Co.*, 38 id. 11. A bill of particulars of matters amounting to mere evidence of special damages, is unauthorized. *Dooley* v. *Royal Baking Powder Co.*, 1 Law Bull. 18. So, of a bill of particulars, in an action for libel, as to the injury to plaintiff's good name and reputation in its business and credit. *American, etc., Co.* v. *Eureka F. H. Co.*, 18 Abb. N. C. 70. So, of a bill of particulars, stating the damages sustained by each refusal of credit to plaintiff. *Lane* v. *Williams*, 37 Hun, 388.

Indeed, the classification of plaintiff's damages which the defendant submitted in his affidavit, suggests that he is sufficiently informed as to those damages to escape all possibility of peril of surprise on the trial. *Gee* v. *Chase M. Co.*, 12 Hun, 630; *Fink* v. *Jetter*, 38 id. 163.

But, defendant swears that he is ignorant of the items of

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plaintiff's claim and damage, and truly; for there are no items of claim or damage — the cause of action and the consequent damage both being single and entire.

The order is affirmed, with costs and disbursements.

DALY, Ch. J., and BISCHOFF, J., concur.

Order affirmed.

STERNBERGER v. METROPOLITAN ELEVATED RAILWAY CO.

(New York Common Pleas — General Term, December, 1892.)

In an action for rental loss to plaintiff's premises from 1885 to 1888 resulting from the construction and operation of defendants' elevated railway, evidence as to how many buildings were erected in the street, the locality of plaintiff's premises, from 1878 to 1892, the time of trial, is inadmissible.

A witness for defendant as to rental value was asked on re-direct: "Have you not during all this time used your best endeavor to get the best rent possible?" An objection that the question was incompetent, was sustained and defendant excepted. *Held*, no error; that the question, being leading, was inadmissible.

APPEAL from judgment on verdict and from order denying new trial. Action at law for rental losses to plaintiff's premises from the construction and operation of defendants' elevated railway. The claim of recovery is from April 11, 1885, to April 11, 1888.

Julien T. Davies and *Brainard Tolles*, for defendants (appellants).

E. W. Tyler and *Henry Schmitt*, for plaintiff (respondent).

PRYOR, J. The appellants concede that "the record presents a sharp conflict of evidence on the question of the amount of damages," and this being so, we are not authorized to set aside the verdict on the ground that it is excessive. *Betjeman* v. *E. R. R. Co.*, 1 Misc. Rep. 138. Still the appellants contend that the judgment is avoided by error in the exclusion of evidence.

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1. This question was propounded to a witness by the defendant, "From 1878 *to the present time*, how many new buildings were erected in South Fifth street?" the locality of plaintiff's premises. On objection that the proposed evidence was immaterial, irrelevant and incompetent, it was excluded, and defendants excepted.

The action was for the recovery of rental loss between 1885 and 1888. Proof of rental loss between 1888 and the time of the trial — 1892 — would have been proof of fact not in issue, and hence inadmissible.

The argument of appellants is, however, that the evidence was relevant and competent to show the effect of the railroad on the prosperity of the street. But the prosperity of the street between 1888 and 1892 was not in controversy, and still the evidence was irrelevant.

Appellants assert again that since between 1888 and 1892 the railroad was operating under the same conditions as between 1885 and 1888, proof of its effect on the prosperity of the street during the former period was evidence of its effect on the prosperity of the street during the latter period. The effect of the railroad between 1885 and 1888 was as capable of direct proof as between 1888 and 1892, and to allow evidence as to the latter period was to rely upon a presumption too far fetched and feeble for the purposes of forensic demonstration.

Besides, direct evidence was in fact given by the defendants as to the effect of the railroad on the prosperity of the street during the period in litigation.

It is the primary and most prevalent law of evidence, that it be the best of which the case in its nature is susceptible. 1 Greenleaf, § 82.

Reverse the contention of the parties; would the defendants have allowed proof of the decadence of the street since the commencement of the action, as evidence of plaintiffs' damages at an anterior period?

The evidence tendered was not only too weak to support a rational inference as to the fact in dispute, but was fraught

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with mischievous consequences to the cause on trial. The enhanced value of plaintiff's property after the action might have been credited by the jury in reduction of the damages they sustained before and for which they sue.

Defendants insist that the plaintiff had been permitted to give evidence of improvements in Greene street since the period in controversy, and that so the court denied them the benefit of the rule accorded to the plaintiff. The record does not support the contention. On the contrary, it is quite obvious that the evidence of improvements in Greene street was restricted to the period in litigation, and disclosed no fact since 1888 — the time of the sale of the property by plaintiff.

2. The defendants proved the course of rents of Nos. 520 and 522 Broadway. On cross-examination the plaintiff showed that a portion of those premises had been vacant; that the rents varied and many changes of tenants occurred from year to year. Whereupon, on redirect, defendants inquired of the witness: "Have you not, during all this time, used your best endeavors to get the best rent possible?" On objection to the question as irrelevant, immaterial and incompetent, it was disallowed; to which defendants excepted.

If admissible to show that the rents realized were the best possible, the legitimate method of proving the fact, was by exhibiting what the witness did to secure the best rents, and not by an opinion or conclusion as to the character of his efforts to that end. In any event, the question was flagrantly leading, and so inadmissible.

Defendants argue, however, on the authority of *Tooley* v. *Bacon*, 70 N. Y. 37, that the irregularity is not available on this appeal. But, here the alleged ground of objection was the incompetency of the question, critically the appropriate objection to a leading interrogatory.

Detecting no error in the record, we must affirm the judgment.

Judgment affirmed, with costs.

Bookstaver and Bischoff, JJ., concur.

Judgment affirmed.

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STARR CASH CAR CO. *v.* REINHART.

(New York Common Pleas — General Term, December, 1892.)

In an action for the purchase price of goods sold and delivered, the answer did not deny the sale and delivery, nor the price, but alleged and set up as a counterclaim, facts constituting a cause of action for conversion, but claimed, not damages for the conversion, but the specific value of the goods applied by plaintiff to its use and benefit. *Held*, that defendant had elected to treat their cause of action as a claim on contract and that it was a valid counterclaim.

The owner of personal property which has been wrongfully converted and retained by the wrongdoer, may waive the tort and sue for and recover its value as upon an implied contract of sale.

APPEAL from judgment of the General Term of the City Court, affirming judgment at Special Term entered on a decision at the trial overruling a counterclaim and directing judgment for the plaintiff. The opinion states the case.

Joseph C. Rosenbaum, for defendants (appellants).

Eugene L. Richards, for plaintiff (respondent).

PRYOR, J. The action is for the purchase price of fifteen cash carriers, sold and delivered by the plaintiff to the defendants. The answer, by not denying, admits the price and the sale and delivery of the cash carriers; and then proceeds to plead a counterclaim as follows: That there was on the premises of the defendants a certain car system; that when the plaintiff placed its service in the store of the defendants it took to itself the old service of the defendants and applied the same to its own use and benefit, without the knowledge of the defendants; that the reasonable value of the said old service was $150; that the defendants have demanded from the plaintiff a deduction to that amount from its bill, and have tendered to plaintiff the sum of $150, and hereby offer to allow judgment to be taken against them for the sum of $150 with interest and costs. At the trial plaintiffs moved for judgment upon the pleadings, "on the ground that the answer did not deny any of the allegations of the complaint,

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and did not set up a counterclaim which could properly be interposed in this action." The motion was granted and judgment directed for plaintiff for the full price of the cash carriers, to which order and direction defendants duly excepted. The sole question for decision is, whether the facts alleged constitute a valid counterclaim?

Defendants insist that the cause of action which they retort upon plaintiff, "arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or in any event, that it is "connected with the subject of the action." Code Civ. Proc. subd. 1, § 501. The contention is obviously untenable. The transaction set forth as the foundation of plaintiff's claim is the sale of the fifteen cash carriers; the cause of action alleged in the answer is the conversion of the old car system.

The sale of one commodity to the defendants, and the conversion of another commodity by the plaintiff, are two totally different and independent transactions. Neither is the cause of action in the answer *connected* with the subject of the action in the complaint. The subject of action in the complaint is the sale of the fifteen new cash carriers; the cause of action in the answer is the conversion of the old car system, between which subsists no legal connection whatsoever. It is not apparent, therefore, on the face of the answer that the cause of action it advances, sustains to the claim in the complaint that common origin or relation which the Code exacts as the indispensible condition of a valid counterclaim. *Edgerton* v. *Page*, 20 N. Y. 281, 285; *Boreel* v. *Lawton*, 90 id. 293, 297; *Thorp* v. *Philbin*, 15 Daly, 155, 158.

But, in an action on contract any other cause of action on contract may be interposed as a counterclaim. Code, subd. 2, § 501. It is to be ascertained, therefore, whether the cause of action exhibited in the answer be a cause of action on contract.

Undoubtedly the facts stated in the answer constitute a cause of action for conversion. But, "if upon the facts alleged, a cause of action in tort, as well as one on contract

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may be spelled out," the pleader may elect to stand either upon tort or contract. *People* v. *Wood*, 121 N. Y. 522. Do the defendants in their answer rely upon tort or contract? Manifestly upon contract. Their claim is not damages for the conversion, but the specific value of the goods applied by the plaintiff to its use and benefit; and that value they plead as a counterclaim, which would be inadmissible were the claim of damages for a tort. Beyond all controversy the defendants elect to treat their cause of action as a claim upon contract.

But, it does not appear that the plaintiff has sold the thing taken; the contrary rather; and the question remains, whether the owner of a chattel converted but not parted with for money or its equivalent, may waive the tort and sue the wrongdoer in assumpsit as upon an implied contract of sale? It is conceded that in England, and in many states of the union, the query must be answered in the negative. See cases collected by Mr. Freeman in his note to *Webster* v. *Drinkwater*, 17 Am. Dec. 242. Nay more, in this state the law was, that trover could not be turned into asssumpsit for money had and received, until the thing converted was exchanged by the wrongdoer for money or money's worth. *McKnight* v. *Dunlop*, 4 Barb. 36, 42; *Harpending* v. *Shoemaker*, 37 Barb. 270, 291; *Osborn* v. *Bell*, 5 Den. 370; *Tryon* v. *Baker*, 7 Lans. 511, 514; *McGoldrick* v. *Willits*, 52 N. Y. 614, 620. When the tort is waived and assumpsit is brought, the receipt of the money on the sale of the goods gives the cause of the action." *Schroeppel* v. *Corning*, 6 N. Y. 107, 112. Meanwhile, however, the current doctrine was subjected to destructive criticism as well by courts as by commentators. Notes of Nicholas Hill to *Putnam* v. *Wise*, 1 Hill, 240, and *Berly* v. *Taylor*, 5 id. 584; 2 Greenl. on Ev. § 108, note 5; Cooley on Torts, 95; Hill on Torts, 42. "A more liberal, and we think, a more sensible, rule, is laid down by the later text-writers, and sustained by many courts, to the effect that the tort may be waived and assumpsit maintained, when the property taken has been converted either into money or into any other beneficial use by the wrongdoer." *Evans* v. *Miller*, 58 Miss. 120.

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"We see no reason why the right to waive the tort and maintain assumpsit should not be as well applicable to the case where the defendant has actually appropriated to his own benefit and used up the plaintiff's goods himself, as where he has sold them to another and received the money, though in the former case the action must be for goods sold and delivered, and not for money had and received." TALCOTT, J., in *Abbott* v. *Blossom*, 64 Barb. 353, 356. "If the defendant had taken the wheat tortiously, the plaintiff, according to the well-known rights of election, might have brought assumpsit for goods sold and delivered." COWEN, J., in *Putnam* v. *Wise*, 1 Hill, 234, 240. "Butts has, therefore, an election against Collins; he can maintain trover or assumpsit, and in the latter case recover the value of the flannels under the common counts for money had and received, or for goods sold." MAISON, Senator, in *Butts* v. *Collins*, 13 Wend. 139, 154. At last, in *Hawk* v. *Thorn*, 54 Barb. 164, it was expressly ruled that "where one has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value." And in *Terry* v. *Munger*, 121 N. Y. 161, the Court of Appeals, per PECKHAM, J., said: "The owner of personal property which has been wrongfully converted by another man, although the property is retained by the wrongdoer, may waive the tort and sue for and recover its value upon an implied contract of sale." The rule as thus held, finds support in the adjudications of other states. *Hill* v. *Davis*, 3 N. H. 384; *Stockett* v. *Watkins*, 2 Gill & J. 326, 342, 343; *Halleck* v. *Mixer*, 16 Cal. 574; *Fratt* v. *Clark*, 12 id. 89; *Borker* v. *Cory*, 15 Ohio, 9. It is commended, moreover, to acceptance by the analogies of the law and the interests of justice. A consent induced by fraud is no consent; and yet the vendor in a fraudulent sale may waive the tort and sue for goods sold. It is conceded that upon a conversion, if the goods be parted with by the wrongdoer, he may be held as for money had and received — his promise to pay being arbitrarily forced upon him by implication of law. So, if he retain the goods, the owner should be allowed to treat the

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transaction as a sale, and the law should imply a promise to pay their value. In such case the tort-feasor will not be allowed to set up his own wrongful intent, in disavowal of the implied promise which the law would otherwise raise against him. *Hill* v. *Perrott*, 3 Taunt. 274, 275; *Lightly* v. *Clouston*, 1 id. 112, 114, per MANSFIELD, C. J. The rule is advantageous to a defendant, since being sued on contract instead of in tort, he is exempt from arrest and may plead an offset.

"No party is bound to sue in tort, when by converting the action into an action on contract he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because the form of action lets in a set-off, and enables him to pay money into court." TINDALL, C. J., in *Young* v. *Marshall*, 8 Bing. 43. Finally, by converting the tort into a contract, and so opening the case to a counterclaim, all the controversies between the parties may be adjusted in a single litigation.

The conclusion is, that the defendants had an option to waive the conversion, and to claim as for goods sold and delivered; and that, by their answer, they elected to proceed upon contract.

The result is, that the counterclaim is valid, and the judgment overruling it erroneous.

Judgment reversed, and a new trial ordered, with costs to appellants to abide the event.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment reversed, new trial ordered, costs to abide event.

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SOUTHARD *v.* MOSS.

(New York Common Pleas — General Term, December, 1892.)

Owners, grantors or assignors of premises prior to the filing of a mechanic's lien, are neither proper or necessary parties to foreclosure proceedings.

Cornell, Secor & Hage, for plaintiff (respondent).

H. R. Squier, for defendant (appellant).

DALY, Ch. J. This is an appeal by the defendant, Maria Moss, from the final judgment upon her demurrer to the complaint, by which judgment her demurrer was overruled, with costs, and she was adjudged barred and foreclosed, with the other defendants, of all equity of redemption in certain leasehold premises, against which the plaintiff filed a mechanic's lien, which this action is brought to foreclose. The judgment directed the sale of the right, title and interest of Frederick S. Myers, the party at whose request the plaintiff furnished the materials which are the subject of his claim, Myers being at the time lessee of the said premises by virtue of an assignment from Maria Moss of a lease to her from Casimear de R. Moore.

Mrs. Moss, having been made a party defendant to the foreclosure of the lien, demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action against her. The plaintiff claims that Mrs. Moss is a proper and even a necessary party to the foreclosure of his lien, because neither her lease nor the assignment of it to Myers was recorded, and, although she had no interest in the property or concern in this litigation, that it was necessary to bind her by an adjudication that she had assigned the lease to Myers, thus to make a marketable title on this foreclosure.

The reason assigned for making Mrs. Moss a party would justify the plaintiff in making the original lessor, Moore, a defendant, for it is said that his lease to Mrs. Moss was not recorded; but I know of no authority for making prior grantors or assignors of the person against whose estate a lien is filed, parties defendant in actions to foreclose such lien,

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whether their conveyances be recorded or not. A mortgagor who has conveyed his equity of redemption by an unrecorded deed, may be made a party defendant to the foreclosure if his mortgage (8 Am. & Eng. Ency. of Law, 211); but this is because the record title still remains in the person who made the mortgage, and so if the party against whom a lien is filed were to convey the interest so incumbered by an unrecorded deed, he might yet be made a party to the foreclosure with or without the statute. But, generally, mortgagors who have conveyed all their interest are neither proper nor necessary parties to the foreclosure. Id. 223.

Only such estate as Myers got by the assignment from Mrs. Moss is subject to the plaintiff's lien. *Jones* v. *Manning*, 6 N. Y. Supp. 338. Mrs. Moss, who conveyed that interest before any claim of the plaintiff arose, cannot be compelled to submit to a judgment in this action which shall secure a purchaser against any possible claim on her part. It is not alleged that she makes any adverse claim, but if she did, the validity of such claim could not be tried in the foreclosure action. *Corning* v. *Smith*, 6 N. Y. 82.

The Lien Act, in prescribing the parties to foreclosure proceedings, does not include owners, grantors or assignors of the premises prior to the filing of the lien, and there is no question involved in this action to the determination of which Mrs. Moss is a proper party. Her assignment is questioned by no one, and the only ground for including her as a party defendant urged by the respondents, *i. e.*, that her lease and assignment were not recorded, is not even alleged in the complaint.

The judgment is reversed, and judgment for defendant Moss ordered upon the demurrer, with leave to the plaintiff to amend within twenty days on payment of costs; if no amendment is made, final judgment upon the demurrer, with costs, to be entered in her favor.

Pryor and Bischoff, JJ., concur.

Judgment reversed.

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SHRIMPTON & SONS (Limited) *v.* DWORSKY.

(New York Common Pleas — General Term, December, 1892.)

In an action for goods sold and delivered, plaintiff, under objection and exception, was allowed to give evidence of work and labor, and the court charged the jury that "if the goods were not in existence at the time of the purchase, but had to be manufactured, then this case does not come within the Statute of Frauds:" this was excepted to, and no amendment of the complaint was made or moved. *Held*, that a judgment for plaintiff should be reversed for the reason that the admission of the evidence was error, as was also the instruction to the jury.

Defendant receipted for the goods as "in good order" and "all right," but the uncontradicted evidence was to the effect that the goods were not in fact delivered, but were left on the sidewalk; that he never saw them, refused to receive them, and returned them to the plaintiff's place of business. *Held*, insufficient proof of acceptance to authorize a submission of the issue to the jury.

APPEAL from judgment of the General Term of the City Court, affirming judgment on a verdict in favor of plaintiff, and from an order affirming order denying a new trial.

Action for goods sold and delivered. The opinion gives the essential facts.

Francis B. Chedsey, for defendant (appellant).

George C. Coffin, for plaintiff (respondent).

PRYOR, J. In form and in substance, the action is for goods sold and delivered, and for nothing else. The allegation of sale and delivery is traversed by an explicit denial in the answer. This, then, was the issue, and the only issue, presented by the pleadings, namely: Whether the plaintiff had sold and delivered to the defendant the goods for recovery of the purchase price of which the action is brought.

Nevertheless, upon the trial, the plaintiff was allowed to give evidence of a different cause of action; that is, for work and labor; and in submitting the case to the jury, the judge expressly charged, that "if the goods were not in existence at the time of the purchase, but had to be manufactured, then this case does not come within the Statute of Frauds." To

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this instruction the defendant duly excepted; and he excepted also to evidence in support of an action for work and labor, on the grounds that "it is irrelevant, incompetent and immaterial," and that "the action is brought for goods sold and delivered, and proof of manufacturing is improper."

True, the defendant did not, in terms, claim a "variance" between the pleadings and proof; nor could he have appropriately urged such claim, because here was not a variance, but a failure of proof of the cause of action formally in litigation. Code, § 541. Furthermore, on the conclusion of plaintiff's case, the defendant moved for a dismissal, on the ground "that there is no proof of the delivery of the goods to the defendant sufficient to satisfy the requirements of the Statute of Frauds." We are unable to conjecture how the defendant could have more unequivocally presented the point that the evidence was directed to a cause of action not alleged in the complaint, and that there was not the requisite correspondence between the pleadings and the proofs.

No amendment of the complaint was made or moved, and the question is whether, against the protest of the defendant, a plaintiff may claim upon one cause of action and recover on another?

In this state the question is no longer open to controversy. In *Romeyn* v. *Sickles*, 109 N. Y. 650, the Court of Appeals held that where an objection has been properly taken, or an exception presents the point, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings, saying (page 652) "it is a fundamental rule that judgment shall be *secundum allegata et probata*," and that, "if a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary."

Here two distinct and independent causes of action were alternatively submitted to the jury, upon either of which they were told, in effect, they might return a verdict for the plaintiff. But one of these causes of action being foreign from the case, did not authorize a recovery by the plaintiff; and, as

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it cannot be ascertained upon which cause of action the jury found for the plaintiff, we are unable to say that the defendant has not been prejudiced by the erroneous rulings on the trial.

We are of the opinion, therefore, that upon the ground indicated, the judgment should be reversed.

But other considerations touching the merits of the controversy conduct to the same conclusion.

The defendant resisted a recovery against him upon the ground that the contract in action was for the sale of goods, and was invalid for want of due delivery and acceptance.

It is argued, however, that the invalidity of the contract under the Statute of Frauds not being pleaded, the defense was unavailable by the defendant. *Wells* v. *Monihan*, 129 N. Y. 161; *Crane* v. *Powell*, 46 N. Y. St. Repr. 668. The answer is, that the point was not taken by the plaintiff on the trial, but, on the contrary, the question of the validity of the contract was litigated by the parties and considered by the court as an essential issue in controversy. At the instance of the plaintiff himself, the court charged that if the goods were not *in use*, but were to be fabricated, the contract was not within the Statute of Frauds. After this explicit concession on the trial that the validity of the contract under the Statute of Frauds was in issue and in controversy, with what consistency or justice can the plaintiff be suffered on appeal to say that the question is beyond the scope of the pleadings? Had the plaintiff raised the objection on the trial, *non constat* but the court would have allowed an amendment of the answer. Having treated the issue as in litigation when otherwise it might have been introduced, the plaintiff may not now be heard to say that it was not in the action. *Effray* v. *Masson*, 18 Supp. 353.

Assuming, then, the defense of the Statute of Frauds to be before us for consideration, we are of opinion that it was established by the undisputed evidence.

The complaint alleges that the plaintiff "sold to the defendant goods, viz., fifty gross needle books." If ever a party is to be bound by his pleading the plaintiff is estopped to say

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that the contract was not for the sale but for the manufacture of goods. And although, without amendment, he was allowed on the trial to prove that the goods were not in existence, his evidence clearly establishes the contrary proposition. The *needles* were the thing contracted to be sold, and although they were to be delivered in envelopes, these were in stock, and nothing remained but to print on them "Empire Stationery and Novelty House, New York." Indisputably here was a contract for the sale of goods and nothing more. *Passaic Man. Co.* v. *Hoffman*, 3 Daly, 495, 504; *Flint* v. *Corbitt*, 6 id. 429; *Cooke* v. *Millard*, 65 N. Y. 352; *Kellogg* v. *Witherhead*, 6 T. & C. 625; *Fitzimmons* v. *Woodruff*, 1 id. 3; *Smith* v. *New York Central R. Co.*, 4 Keyes, 180; *Lamb* v. *Crafts*, 12 Metc. 353; *Clark* v. *Nichols*, 107 Mass. 547; *Gardner* v. *Joy*, 9 Metc. 177; *Cason* v. *Cheely*, 6 Ga. 554; *Atwater* v. *Hough*, 29 Conn. 508; *O'Neil* v. *Mining Co.*, 3 Nev. 141; *Finney* v. *Apgar*, 31 N. J. L. 266. *Warren C. Co.* v. *Holbrook*, 118 N. Y. 587, is not *contra.*

The contract being within the Statute of Frauds, the question is, would the jury have been justified, on the evidence, in finding an acceptance of the goods by the defendant? The point was duly raised by a motion to dismiss as well as by requests to charge.

For evidence of due acceptance, the respondent relies upon the fact that the defendant receipted for the case of needles as "in good order" and said "it is all right." But, it is uncontradicted that the needles were not in fact delivered to the defendant, but were left on the sidewalk; that he never saw them; that he refused to receive them, and returned them to the plaintiff's place of business. The proof of acceptance was insufficient to authorize a submission of the issue to the jury. *Shindler* v. *Houston*, 1 N. Y. 261, 271, 273; *Cooke* v. *Millard*, 65 id. 352, 357, 358; *Caulkins* v. *Hellman*, 47 id. 449, 452; *Stone* v. *Browning*, 51 id. 211, 214, 215; 68 id. 598, 604; *Heermance* v. *Taylor*, 14 Hun, 149, 151; *Fitzimmons* v. *Woodruff*, 1 T. & C. 3; *Kellogg* v. *Witherhead*, 6 id. 525. In *Jones* v. *Reynolds*, 120 N. Y. 213, the buyer took the

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model into his possession, retained it for a year without returning it or offering to return it, and solicited a patent on the basis of it. Of course the court held that there was evidence of acceptance for the jury; but the ruling is obviously inapplicable to the case before us.

Judgment reversed and new trial ordered, costs to abide event.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment reversed, new trial ordered, costs to abide event.

WILSON *v.* MANHATTAN RAILWAY CO.

(New York Common Pleas — General Term, December, 1892.)

A judgment in a criminal action cannot be used in a civil suit to establish the facts on which such judgment rests.

In an action for false imprisonment justification must be pleaded, and a denial of knowledge or information whether defendant caused the arrest raises no issue.

APPEAL from judgment on verdict and from order denying a new trial.

Action for false imprisonment. The opinion gives the facts.

Joseph H. Adams, for defendant (appellant).

Eugene F. Daly, for plaintiff (respondent).

PRYOR, J. Not often does a railroad company appear in court with a case of such moral merit as, in the present action, must be conceded to the defendant. It is sued for damages incurred, if at all, in attempting to protect its female passengers from indecent assaults; and surely it is entitled to every encouragement in so laudable an endeavor. Still, unless error be apparent in the record, we have no alternative but to affirm the judgment.

It is admitted that the plaintiff was arrested; and, hence, the only issues before the jury were, whether he was arrested by the defendant, and whether his arrest was unlawful.

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We are favored with very elaborate briefs by the respective counsel, and yet the questions for decision are simple and not of difficult or doubtful solution.

That the plaintiff was arrested at the instigation of the defendant, that is by the defendant, and that he was innocent of the offense for which he was detained, were found by the jury upon conflicting evidence; and we are not of the opinion that the preponderance of proof against these facts is so clear and decisive as to justify us in reversing the denial of a new trial by the learned judge who heard the testimony and observed the witnesses. From his position he was peculiarly qualified to determine whether the verdict involved a miscarriage of justice; and although it appears to us of doubtful validity, we do not feel authorized to gainsay the concurrent conclusions of the jury and the presiding judge.

The plaintiff was arrested for breach of the peace, but without a warrant; and the question is, did the occasion authorize the arrest by the defendant without a warrant?

In this state the law is: that "if a felony or a breach of the peace, has, in fact, been committed by the person arrested, the arrest may be justified, by any person without a warrant, whether there was time to procure a warrant or not; but if an innocent person be arrested upon suspicion by a private individual, such individual is not excused *unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested.*" *Burns* v. *Erben*, 40 N. Y. 463, 466; *Hawley* v. *Butler*, 54 Barb. 490; *Brown* v. *Chadsey*, 39 id. 253, 263; *Holley* v. *Mix*, 3 Wend. 350.

The defendant, then, being justified in the arrest if a breach of the peace had been committed and there was reasonable ground to suspect the plaintiff of the offense, the inquiry is, had such breach been committed, and was probable cause shown to suspect the plaintiff? Since the assault, if any, upon the lady was commited by the plaintiff, and he testified that he put his hand on her shoulder with an innocent and even commendable motive, the conflict of evidence raised a question for the jury, and the verdict is conclusive against the

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appellant that no assault was committed. And as to the question of probable cause to suspect the plaintiff, it was expressly referred to the jury by the learned trial judge, and that issue too the verdict conclusively determines against the defendant.

It follows, therefore, that the defendant failed to justify the arrest.

The police court convicted the plaintiff; and appellant contends that the trial judge erred in refusing to charge that such conviction was evidence of plaintiff's guilt. The proposition is untenable. A judgment in a criminal prosecution is admissible in civil case only to establish the fact of the *rendition* of the judgment, but is not evidence of the facts upon which the judgment proceeded, that is, of the guilt of the accused. And this because neither the parties, nor the rules of decision, nor the course of proceedings, are identical in the two actions. 1 Greenl. on Ev. § 587; 2 Wharton's Law of Ev. § 776. In malicious prosecution an acquittal of the plaintiff, though an indispensable condition of the action, is not evidence of his innocence between the parties.

Appellant urges, finally, that the trial judge coerced the jury to an agreement on a verdict; but the contention is without support in the record. "It is not error for a judge to refuse to discharge the jury until they have agreed upon their verdict; and whether or not to discharge them then, is a question addressed to his discretion." *White* v. *Calder*, 35 N. Y. 183. It is his right, and his duty even, to exhort the jury to an agreement. *S. C.*, 184; *Green* v. *Telfair*, 11 How. Pr. 260; *Erwin* v. *Hamilton*, 50 id. 32. The motion, moreover, should have been made at Special Term. Cases, *supra.*

We have considered the case as if the points discussed were presented by the pleadings; but, in truth, neither justification of the arrest nor defendant's responsibility for it, was put in issue by the answer. A denial of knowledge or information whether defendant caused the arrest, is nugatory (*Lawrence* v. *Derby*, 15 Abb. 346, note); and justification, to be avail-

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able, must be pleaded as a defense to the action. *Brown v. Chadsey*, 39 Barb. 253.

It results that the judgment must be affirmed.

BISCHOFF and BOOKSTAVER, JJ., concur.

Judgment affirmed, with costs.

TOPLITZ *v.* ULLMAN.

(New York Common Pleas—General Term, December, 1892.)

A servant wrongfully discharged at a season when persons in his line were not usually employed, and unable to obtain employment, went into business for himself. In an action to recover damages for his discharge, the trial justice instructed the jury that if they found in plaintiff's favor, defendant was entitled to be credited with the amount of the actual profits earned by plaintiff in his business during the stipulated period of service with defendant, and not with the value of plaintiff's services. *Held*, correct.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment in favor of the plaintiff for $1,130.82.

The action is to recover damages, by reason of the plaintiff's alleged wrongful discharge from the service of the defendant, under a contract of employment for one year, commencing March 18, 1890, and terminated by the alleged wrongful discharge the next day.

DALY, Ch. J. After the plaintiff was wrongfully discharged from the defendant's service, he endeavored to procure other employment, but was unsuccessful, and thereupon he embarked in business upon his own account, in partnership with another. His share of the profits of the copartnership during the stipulated period of service under his contract with the defendant was $200. This sum, under the instruction of the court, was allowed by the jury as a deduction from the amount of the agreed wages which the plaintiff was prevented, by his discharge, from earning in the defendant's service.

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The defendant claims that the plaintiff, having appropriated his entire services for his own benefit, the value of such services should have been ascertained and deducted from the amount of agreed wages, irrespective of the actual profits he had earned. If the plaintiff could have obtained other employment, and declined it to go into business for himself, the defendant's contention would be just, and the damages would be confined to the difference, if any, between the agreed wages and the value of the services which the plaintiff might have hired to another; but this would be upon the principle that he had neglected the duty of reducing his damages by seeking other employment. The same rule would apply if the plaintiff, without seeking other employment, chose to go into business for himself. This was evidently the case in *Huntington* v. *Ogdensburgh, etc. R. Co.*, 33 How. Pr. 416, cited by appellant, for it does not appear from the report that the plaintiff there made any exertion to find employment, and the case is unquestionable upon the facts in it.

Where, however, the discharged servant has fulfilled his duty in seeking other employment, has failed to find it, and has embarked in business for himself rather than remain idle, taking all the hazards of such a venture in order to reduce his damages, the defendant cannot complain that his returns therefrom were less than his services were worth. Had plaintiff remained idle after seeking and failing to obtain other employment, he would have been entitled to the whole stipulated wages, and he is not to be worse off because he availed himself of the only opening which he found. Any other rule would operate to punish him for his diligence and activity in trying to reduce his damages, and would fix a premium upon indolence.

It would have been legitimate for the employee (if no better opportunity presented itself) to take service upon an agreement for a share in profits as compensation, and in that case his actual earnings being his actual salary would have been the measure of allowance to which the defendant would be entitled, or he might take employment at agreed wages far

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below the value of his services, and if that were the best he could do, the defendant would have no right to complain that only the amount actually earned was allowed.

The defendant argues that the plaintiff by engaging in business upon his own account voluntarily relinquished the chance of taking or finding other employment; this, however, could with equal justice be urged if he had engaged for the balance of his term with another employer at a smaller salary. He would thus equally deprive himself of the opportunity of taking or finding other employment. There was no proof that other employment could be procured, on the contrary, the evidence is that when he was discharged it was not the season when persons in his line were usually employed.

The appellant does not seem to question that the profits earned by the plaintiff were all that were actually coming to him in the copartnership business. It appears that what he drew for expenses, etc., was obtained from advances or loans which had to be repaid. So I think upon the facts of this case the instruction of the learned judge at trial term was correct, and so was the affirmance at the General Term, and that the judgment and order should be affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Judgment affirmed.

DeLacy *v.* Walcott.

(New York Superior Court—General Term, January, 1898.)

The complaint alleged that plaintiff contributed $10,000 towards securing a franchise for the defendant corporation upon the agreement with defendants that he should receive the same amount of money and stock as the original promoters. He, in fact, received $10,000 in the stock of the company and a writing stating that he was entitled to $10,000 of first mortgage bonds of another corporation. There was no allegation that the original promoters received any stock or money over and above what plaintiff had received, or that they had received anything at all. No allegation of a breach by defendants, or either of them, of the agree-

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ment sued on was alleged, nor was there any allegation that what plaintiff received was not equal to whatever the original promoters received. *Held*, on demurrer, that the complaint failed to state a cause of action.

APPEAL from interlocutory judgment overruling demurrer.

The plaintiff, Peter DeLacy, brings this action to compel the specific performance by defendants of an agreement to deliver to him his distributive share of $1,000,000, the capital stock of the defendant Rapid Transit and Bridge Construction Company and the repayment of the sum of $9,500 and other relief. The defendants, Walcott and Rapid Transit and Bridge Construction Company, demurred to the complaint, "on the ground that it appears on the face thereof that the amended complaint does not state facts sufficient to constitute a cause of action." The appeal is from an interlocutory judgment, entered at Special Term, overruling the demurrer.

Hahn & Myers (*E. J. Myers*, of counsel), for plaintiff (appellant).

Lowery, Stone & Auerbach, for defendants (respondents).

GILDERSLEEVE, J. The first and second paragraphs of the complaint set forth formal matters not necessary to mention here, while the third and fourth and a portion of the fifth set forth the alleged representations made by defendant Alfred F. Walcott as a basis for the agreement in question and inducement to plaintiff to enter therein. In the fifth paragraph, the obligations of defendants created by the agreement are alleged as follows: "The said defendant Alfred F. Walcott promised and agreed, in his own behalf and in behalf of said defendant Rapid Transit and Bridge Construction Company, that if this plaintiff would invest and contribute the sum of ten thousand dollars towards the said sum of one hundred thousand dollars; that said Rapid Transit Company and said defendant Alfred F. Walcott would pay to this plaintiff the same amount of stock and money which the original promoters of said defendant Rapid Transit and Bridge Construction Company should or would receive from said defendant Rapid Transit and

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Bridge Construction Company, and that said plaintiff should receive from and be paid by said Rapid Transit and Bridge Construction Company and defendant Alfred F. Walcott an amount equal to whatever the said original promoters received."

From a perusal of the complaint to the end of the fifth paragraph, it appears that defendant Walcott has secured a franchise to build an elevated railroad in Chicago, for which he was to pay, by a certain time, $100,000, or forfeit the franchise. The Rapid Transit and Bridge Construction Company, one of the defendants herein, had been incorporated with a capital of $3,000,000. It had agreed to purchase the franchise and pay therefor $95,000 in cash and $1,000,000 of its capital stock. The defendant Walcott wanted to raise $100,000 to pay to the city of Chicago, and so avoid the forfeiture and make the franchise permanent. The object of the agreement was to obtain from plaintiff $10,000 toward making up the $100,000 required.

The sixth paragraph alleges the authority of defendant Walcott to make an agreement of the character in question that would be binding on defendant Rapid Transit and Bridge Construction Company.

In this discussion, we are not attacking the validity of the agreement, but assume that the transaction was *bona fide*, and that the agreement was as alleged and a valid and binding one upon defendants Walcott and Rapid Transit Company.

In the seventh paragraph, plaintiff alleges that, relying upon the statements and promises as before set forth and induced thereby, he paid defendant Walcott the sum of $10,000, to be used for the purpose of securing and retaining the franchise aforesaid.

In the eighth paragraph, the plaintiff alleges that the whole amount of $100,000 was raised and paid to the city of Chicago for said franchise, and that the franchise so obtained was transferred to the defendant, the Rapid Transit Company, and that said Rapid Transit and Bridge Construction Company assumed and agreed to carry out the promises, agreements and undertakings set forth in the fifth paragraph.

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In the ninth paragraph plaintiff alleges that "the defendant Rapid Transit and Bridge Construction Company repaid said guaranty fund, to wit, the sum of $95,000 in cash, and also further issued in payment of said franchise the sum of $1,000,000 in shares at par of the capital stock of said defendant Rapid Transit and Bridge Construction Company." The plaintiff does not state in this paragraph to whom the $95,000 was paid, nor to whom the $1,000,000 in shares of capital stock were delivered.

The tenth paragraph of the complaint sets forth the extent of the interest which the original promoters had in the transaction by alleging that they "were to receive from said Walcott and Rapid Transit and Bridge Construction Company, for the moneys invested by them, $1,000,000 of the capital stock of said defendant Rapid Transit and Bridge Construction Company, and were to be paid, in addition thereto, ninety-five per cent of the amount contributed by them to and invested in said sum of $100,000." It is not alleged when the original promoters were to receive the stock and money; no date or event is named when they would be entitled to claim the same.

The substance of the eleventh paragraph is that said defendant corporation and Walcott issued and delivered in payment of said franchise to defendant Walcott and divers persons, to the plaintiff unknown (who are, therefore, designated as John Doe and Richard Doe), shares of capital stock of said defendant corporation to the amount of par value of the sum of $1,000,000, and paid to the said Walcott and such unknown persons the sum of $95,000 in cash. There is no statement here that the "divers persons," or any of them, constituted the original promoters, or any of the original promoters, or persons who organized said defendant corporation.

The twelfth and last paragraph of the complaint alleges a demand by the plaintiff of the defendant Rapid Transit and Bridge Construction Company and defendant Walcott for the payment of the sum of $95,000 in cash and shares of the defendant corporation to the amount at par value of the sum

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of $100,000, being the amount of cash money and shares of stock (what amount or what shares is not stated), but that "said defendants have refused to pay him the said money or deliver to him the said stock, excepting only that they delivered to him 100 shares of the capital stock of the defendant Rapid Transit and Bridge Construction Company of the par value of $10,000, and a paper writing stating that this plaintiff is entitled to $10,000 of the first mortgage bonds of the Chicago and South Side Rapid Transit Company."

The amended complaint fails to set forth a cause of action in favor of the plaintiff, for the reason that it does not allege that the original promoters received any stock or money over and above what had been delivered to the plaintiff. There is no allegation in the complaint of a breach by defendants, or either of them, of the agreement which the action seeks to enforce by compelling a specific performance thereof. It is clear that by the terms of the agreement the plaintiff was to receive from the Rapid Transit and Bridge Construction Company and defendant Walcott an amount of stock and money equal to whatever the original promoters received. This was the promise made to the plaintiff and the inducement upon which he parted with $10,000. No allegation can be found in the complaint that sets forth a breach of this agreement. It is nowhere in the complaint alleged who the original promoters of the said defendant corporation were, or how many there were of them, except that it appears from an examination of the fifth and tenth paragraphs of the complaint that by "original promoters" was meant the persons who organized and exploited the defendant corporation. These were the persons among whom plaintiff was to be an equal. Their respective rights were to determine his. The agreement contemplated a division of the stock and money, and when the division came, plaintiff was to have an amount equal to whatever these persons, called "original promoters," received. But what this amount was the complaint fails to show. Indeed, it does not appear from the complaint that these promoters received anything.

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The complaint sets forth the agreement with great clearness and comprehensiveness, but it fails to allege a violation of it by either the defendant Walcott or the defendant corporation. It does not state what promise or obligation, created by the agreement, the defendants, or either of them, failed to perform. There is nothing in the complaint to show that 100 shares of capital stock of the defendant corporation, which the plaintiff acknowledges having received, is not equal to whatever the original promoters received.

It is plain that if the plaintiff has a cause of action, it is because he has not received an amount equal to whatever the original promoters received; and we are of opinion that this cause of action is not set forth in the complaint and that the complaint fails to state any cause of action.

A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim on the trial. He may know precisely what he is sued for, when he receives the summons; yet it is his right to have a complaint from which he can learn what he is sued for, and to insist that it shall state the cause of action which he is called upon to answer.

The interlocutory judgment of the Special Term must be reversed, with costs, and the joint and several demurrer of the defendants, Alfred F. Walcott and Rapid Transit and Bridge Construction Company, to the amended complaint must be sustained with costs, with leave to plaintiff to amend the complaint upon payment of such costs.

FREEDMAN, J. I concur. The action not being for an accounting and the recovery of a balance upon facts to be ascertained, but for the recovery of a definite and specific share, the facts upon which the plaintiff is entitled to such share should have been set forth. The complaint fails to allege sufficient facts for that purpose.

Judgment accordingly.

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KORMINSKY *v.* KORMINSKY.

(New York Superior Court — General Term, January, 1893.)

A father orally agreed with three sons that if they would purchase certain land and cause it to be conveyed to him for a home for life, he would devise the premises to them by his will. The sons purchased the land, paying therefor before their father's death. The father died, leaving a will devising the land as agreed, but it was lost or destroyed. *Held*, that, as the sons had fully executed the agreement on their part, specific performance of the agreement on the part of their brother who refused to convey his interest would be decreed.

Held, further, that on the death of their father, plaintiffs became the equitable owners of the land and the court had power to decree the equitable title to be a legal one and enforce it by compelling a specific performance of the agreement by the heirs refusing to deed their interest.

If warranted by the allegations of a complaint, an amendment so as to demand equitable relief is discretionary with the trial court.

Two sisters of the parties, who had deeded their interest in the premises to plaintiffs, were allowed to testify as to conversations with their father relating to the said agreement and his will. *Held*, that section 829 of the Code did not apply, and exceptions to their testimony based thereon were of no avail, as they were in no way interested in the event of the action, nor was plaintiffs' claim derived by assignment or conveyance.

APPEAL by the defendant from a judgment, entered upon a decision on a trial before the court, without a jury, compelling specific performance of an agreement to devise real estate, and ordering a conveyance from defendant, one of the heirs of the estate of Abraham Korminsky, deceased, to the plaintiffs.

Abraham Korminsky, the father of the parties to this action, died in March, 1891, leaving him surviving, as his heirs at law, the parties to this action, and Rachel Lubin, Anna Baron and Mary Harris. At the time of his death he held the title to the premises in question, under a deed from one Eliza Basch, dated April 1, 1873. The purchase from Eliza Basch was made by the plaintiffs, and the whole consideration for the conveyance was paid by them. The conveyance was made to the said Abraham Korminsky, at the request of the plaintiffs, for the sole purpose of securing to him a home during the remainder of his life. At the time of such conveyance, the said Abraham Korminsky promised, in consideration of such

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purchase by the plaintiffs and conveyance to him, that he would devise said premises to the plaintiffs in and by his last will and testament, and, relying upon such promise, the plaintiffs purchased the premises and caused them to be conveyed to the said Abraham Korminsky, who took possession thereof and lived thereon until the time of his death. In pursuance of said agreement, the said Abraham Korminsky did make a last will and testament, whereby he devised to the plaintiffs said premises, but said will has been lost or destroyed. Prior to the time of the commencement of this action, the defendant was informed by plaintiffs of such agreement, and was requested to execute a conveyance to the plaintiffs, which request the defendant refused. The other heirs at law of said Abraham Korminsky, deceased, without consideration, have given conveyance to the plaintiffs for the purpose of carrying out said agreement. The defendant removed to the state of California about twenty years ago and has not since returned to the state of New York, nor since said removal has he contributed anything towards the support of his father, the said Abraham Korminsky.

Job E. Hedges (*William Erdman*, of counsel), for defendant (appellant).

Hess, Townsend & McClelland (*W. J. Townsend*, of counsel), for plaintiffs (respondents).

GILDERSLEEVE, J. The equity powers of the court are invoked by the plaintiffs in this action to compel the specific performance of the agreement entered into with their father at the time they caused the premises in question to be conveyed to him. If the agreement was established on the trial by competent evidence, and it is one which a court of equity should enforce by compelling specific performance, it follows that the judgment herein was correct and should be sustained.

The fifth finding of fact made by the learned trial court is as follows: "That at the time of such conveyance the said Abraham Korminsky promised and agreed to and with said

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plaintiffs that, in consideration of such purchase by them and the conveyance to him, he would make a last will and testament, wherein and whereby he would devise to said plaintiffs said premises, and that he would leave said premises to said plaintiffs in and by a last will and testament; and that the plaintiffs, relying upon such promise and representations, purchased said premises and procured the same to be conveyed to the said Abraham Korminsky."

There is abundant evidence to sustain this finding. No evidence was introduced on the subject by defendant, and the testimony of plaintiffs' witnesses makes out the agreement beyond all doubt.

The agreement, however, is attacked by the learned counsel for defendant upon the ground that it was not in writing, and, therefore, was absolutely void under the Statute of Frauds. This position is not tenable, for the reason that it clearly appears from the evidence that there was a full and complete performance of the verbal agreement on the part of the plaintiffs. They paid $2,000 in cash at the time the conveyance was made. The property was taken subject to two mortgages, amounting to $11,000, interest on which mortgages the plaintiffs paid until such time as they paid the mortgages in full and had them discharged of record. All this was done before their father died. A parol agreement in respect to land cannot be avoided in equity because not in writing, where there has been a part performance of it. *Smith* v. *Smith*, 51 Hun, 164. Part performance by the party seeking to enforce the contract is sufficient. *Freeman* v. *Freeman*, 43 N. Y. 39. The Statute of Frauds does not apply to this case.

The agreement can be enforced against the heirs at law of the promisor. An agreement, on good consideration, and without fraud or undue influence, to devise land, is valid, and will be enforced by compelling a conveyance from the heirs of the promisor or purchasers, with notice. *Parsell* v. *Stryker*, 41 N. Y. 480; *Lobdell* v. *Lobdell*, 36 id. 327; *Kenyon* v. *Youlen*, 53 Hun, 592.

There was an adequate consideration for the agreement in

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question, and there is no imputation of fraud or undue influence in its procurement. The transaction was a commendable one, and in every respect meritorious, and an agreement of a nature that courts of equity should view with favor.

"The rule which courts of equity have adopted in suits for the specific performance of contracts requires that the contract be established by competent and satisfactory proof, to be clear, definite and certain, for the reason, as Judge STORY expresses it, that a court of equity 'ought not to act upon conjectures,' and if the proof should end in leaving the contract uncertain, so that the court cannot say what its precise import and limitations are, a decree for a specific performance will be withheld." *Lobdell* v. *Lobdell*, 36 N. Y. 327. The agreement under consideration seems to meet every requirement of the rule adopted by courts of equity. The decreeing of a specific performance of the contract imposes no hardship or injustice upon the defendant, while the denial of such a decree would operate as a fraud upon the plaintiffs. They executed every part of their agreement, in confidence that the other party would do the same. To permit such other party, or his heirs, now to withdraw from the performance of the contract would aid a manifest fraud against the plaintiffs. It appears from the evidence that there was never any desire or intention manifested by the father of the parties to this action, with whom the agreement was made, to avoid its performance or defeat its operation. It is found as a matter of fact, upon competent and sufficient evidence, by the learned trial court "that Abraham Korminsky, in pursuance of said agreement, made a last will and testament, wherein and whereby he devised said premises to plaintiffs, but that said will had been lost or destroyed, and plaintiffs have been unable, after diligent search, to find the same." All the other heirs except the defendant, not parties to the agreement, have conveyed to plaintiffs all the interest in said premises which may have descended to them as heirs at law of Abraham Korminsky, without consideration, and for the purpose of carrying out the agreement in question.

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The equity powers of the court are ample to enforce the agreement in the manner sought. By virtue of the agreement, upon the death of Abraham Korminsky, the plaintiffs became the equitable owners of the premises in question, vested with an equitable title thereto. Gerard on Titles, 477. They had not only a right to secure a legal title by conveyance, but, as they were equitable owners under an equitable title, it is within the equitable powers of the court to decree that the equitable title be a legal title. Gerard on Titles, 477 *et seq.*; *Knolls* v. *Barnhart*, 9 Hun, 443; *Thorp* v. *Stewart*, 44 Hun, 232.

In 5 Wait's Actions and Defenses, 831, it is stated as follows: "A suit for specific performance, like that of foreclosure, is of a twofold character, partly *in personam* and partly *in rem*. The court may enforce the contract either by operating upon the person to compel a conveyance, or may pass the title of the land by decree."

In *Bennett* v. *Abrams*, 41 Barb. 619, the court says, "the plaintiff herein is entitled to a specific performance of the agreement. That, however, may be impracticable. If so, then he may have proximate relief in some other form, which will secure to him the substantial advantages of his contract."

The court below committed no error in permitting the plaintiffs, at the beginning of the trial, to amend their complaint so as to demand equitable relief. The motion was addressed to the discretion of the court and the amendment was warranted by the allegations of the complaint.

The exceptions taken to the rulings admitting the testimony of Mary Harris and Anna Baron, sisters of the plaintiffs, as to conversations with their father relating to the agreement and the will, are based upon section 829 of the Code. That section has no application here, for the reason that the witnesses are in no way interested in the event of the action, nor was the claim of plaintiffs derived by assignment or conveyance from them. Code, § 829; *Lobdell* v. *Lobdell*, 36 N. Y. 327; *Kenyon* v. *Youlen*, 53 Hun, 592.

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We find no other errors, assigned by the learned counsel for defendant, that call for discussion.

The judgment of the court below must be affirmed, with costs.

FREEDMAN and MCADAM, JJ., concur.

Judgment affirmed.

POHL *v.* PONTIER.

(New York Superior Court — General Term, January, 1893.)

The defense of the Statute of Frauds must be pleaded, unless the complaint on its face discloses a case within the statute.

APPEAL from judgment, entered on verdict of a jury, and from order denying motion for new trial.

Blumenstiel & Hirsch (*A. Blumenstiel*, of counsel), for plaintiff (respondent).

Edward Grosse (*Henry Wehle*, of counsel), for defendants (appellants).

GILDERSLEEVE, J. This action is brought to recover damages for a breach of contract. The complaint alleges that on the 13th day of January, 1890, the plaintiff and defendants entered into an agreement, whereby the defendants employed plaintiff for one year from said date, at a weekly salary of twenty-five dollars during said term, and the further sum of $300 at the expiration of the year; that he entered upon the discharge of his duties, and on the 5th day of May, 1890, was discharged by the defendants, without any just or reasonable cause. The answer denies every allegation in the complaint, and for a further and separate defense avers that, induced by representations made by plaintiff as to his qualifications, the defendants, on or about the 13th day of January, 1890, entered into an agreement with the plaintiff, whereby they employed plaintiff from week to week, at a weekly salary

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of twenty-five dollars, and that on the 5th day of May, 1890, they discharged him for the reason that he was incompetent, negligent and unreliable.

The plaintiff's testimony supported the complaint; while the defendants' testimony sought to disprove the plaintiff's position, and to establish their own version of the contract. The questions of fact were properly submitted to the jury by the learned trial judge, and the jury, by their verdict, found in favor of plaintiff's contention. With this conclusion of the jury the General Term will not interfere.

The learned counsel for appellants urges one ground for reversal, which, he claims, arises from the refusal of the court below to charge, in behalf of defendants, the following request: "If the contract was made on the seventh or eighth of January, as testified to by Mr. Pontier, the plaintiff cannot recover, even if it had been a contract for a year; that such a contract would be void under the Statute of Frauds."

The form of the request is somewhat misleading, as the defendant Charles E. Pontier did not testify that the contract was made on the seventh or eighth of January, but that "he (plaintiff) came again between the seventh and thirteenth of January, and we talked the matter over again, * * * and it was settled he was to come on the thirteenth of January." The defendant, further testifying, goes on to say, however, that no conversation took place on the thirteenth of January, with regard to the contract; that he (plaintiff) merely came in and said that he was ready to work, and that he (the defendant Charles E. Pontier) said "All right." Neither the complaint nor the answer state whether the contract was oral or in writing, and the answer does not set up as a defense the Statute of Frauds.

We are of opinion that no prejudicial error was committed by the learned trial judge in refusing to charge as requested by defendants' counsel.

The general rule is that the defense of the Statute of Frauds must be pleaded, except where the complaint, on its face, discloses a case within the statute. *Porter* v. *Wormser*, 94 N.

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Y. 431. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, such a defense cannot be made available, unless set up in the answer. *Hamer* v. *Sidway*, 124 N. Y. 538. No such defense is pleaded, and it is not raised by the averments of the complaint; and without one or the other of these conditions, the defense, if existing, cannot be made available. *Wells* v. *Monihan*, 129 N. Y. 161. In such a case it is sufficient that plaintiff's testimony establishes a valid contract.

For the reasons above stated, the judgment and order appealed from must be affirmed, with costs.

FREEDMAN and MCADAM, JJ., concur.

Judgment affirmed.

MONTGOMERY *v.* WATERBURY.

(New York Superior Court — General Term, January, 1893.)

Plaintiff's complaint was framed upon the theory that he was entitled to recover the reasonable value of a license to use a patented process. He had a verdict upon proof of an agreement between him and defendants that he, as superintendent of their factory, was to use the patented process in defendants' business for a reasonable compensation over and above his salary. The evidence to prove plaintiff's case was admitted without objection that it varied from the complaint. *Held*, that after the close of the testimony on both sides, it was too late to raise the point.

Held, further, that the variance between the proof and the allegations of the complaint were not sufficient to reverse the judgment.

In an action to recover compensation for the use of a patented process, the licensee cannot set up the invalidity of the patent.

Under a contract, defendants had paid plaintiff for the use of his patents ten per cent of the value of the gain in the weight of the goods manufactured. At the end of the term of the contract, he was told by one of defendants' firm to go on and that a satisfactory arrangement would be made with him for the use of his patents. Plaintiff went on, used his patents, and all subsequent efforts to get at a fixed basis of compensation failing, left defendants' employ. *Held*, that the actual gain in weight during the period in controversy furnished the best basis for computing the reasonable value of the use of plaintiff's processes, and proof as to the validity or invalidity of his patents was immaterial.

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APPEAL by the defendants from a judgment entered in favor of the plaintiff upon the verdict of a jury, and from an order denying defendants' motion for a new trial. The opinion states the case.

Betts, Atterbury, Hyde & Betts, for defendants (appellants).

Hathaway & Montgomery, for plaintiff (respondent).

FREEDMAN, J The action was brought to recover the reasonable value of a license to use two patented processes relating to the manufacture of ropes and yarns, and familiarly known as the tar and the oil processes, under an alleged license from the plaintiff to the defendants. This is the theory of the complaint. Upon the trial the plaintiff had a verdict upon the theory that pursuant to an agreement made between him and the defendants, he, as the superintendent of defendants' factory, was to use the said patented processes in the business of the defendants and for a reasonable compensation over and above his regular salary. No claim was made by the defendants at any time during the trial that they were in any way surprised by the proof, and all the evidence to prove the plaintiff's case was admitted without objection on the part of the defendants that it varied from the complaint.

Under these circumstances it was too late for the defendants to attempt to raise the point after the close of the testimony on both sides. Even then they did not claim that they had been surprised. Moreover, there was no variance between the allegations of the complaint and the proof sufficient to call for a reversal of the judgment. The proof abundantly established that the plaintiff was employed to use in the business of the defendants certain processes in oil or tar which he had invented and for which he had applied for or obtained a patent, and that while the plaintiff had the right for the purposes of the contract to use any other processes which he might invent, yet as matter of fact no others were invented, and what the plaintiff was paid for at the end of the first year was for the use of his patented processes mentioned in

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the complaint, and when the agreement was made for the continuation of that use, the idea was that those processes or other similar processes, should continue to be used, and, as matter of fact, the plaintiff did use the same processes which he had used before, and for which he had a patent, so that the intent of the parties in substance was that the plaintiff should be paid for the use of his patents.

The defendants having contracted with the plaintiff for the use of his patents, and agreed to pay him a compensation therefor, cannot set up the invalidity of the patents as a defense to the action to recover the compensation. *Hyatt* v. *Ingalls*, 49 N. Y. Super. Ct. 375; 124 N. Y. 93.

It is not necessary, as happened to be the additional fact in *Hyatt* v. *Ingalls*, that the defendants should have bound themselves by the express terms of their agreement not to question the validity of the plaintiff's patents, for even without such a clause they are estopped. *Saltus* v. *Belford Co.*, 133 N. Y. 499.

Nor is it necessary to show an express agreement to pay for the use or an agreement for a fixed sum. An action will lie to recover the reasonable value of the use of a patent where the patent has been used under such circumstances as are sufficient to warrant the inference of an implied agreement to make compensation for the use. *United States* v. *Palmer*, 128 U. S. 262; *Packet Company* v. *Sickles*, 19 Wall. 611.

The defendants insist, however, that even if they were estopped from raising at the trial the point of the invalidity of the patents as a complete defense to plaintiff's cause of action, evidence of the validity or invalidity of the plaintiff's patents was material as affecting the value of the use of the patents. The action is not for a fixed license fee, but for the reasonable value of the license during a certain period. The defendants never promised a definite sum. In such a case the validity or invalidity of the patent ordinarily has an important bearing on the amount of the value to be recovered. But in the present case such proof became immaterial for the following reasons:

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For the year preceding the period in controversy here there was a written contract in force between the parties under which the defendants were bound to pay to the plaintiff for the use of his patents ten per cent of the value of the gain in weight of the goods manufactured. Rope is sold by weight, that is, at so much a pound, and it was considered that if any of plaintiff's processes would take the same amount of raw material, that is, so much hemp or sisal, and make out of it more pounds of rope than could be obtained by the old method, the gain in weight so obtained would be the direct profit of the process. Under this contract the plaintiff did use his processes and with them produced a gain in the weight of the goods. At the end of the year, or rather as soon thereafter as the books were made up, the defendants furnished the plaintiff with a statement of such gain in weight as shown by their books as compared with the gain in weight during the previous year, and in accordance with this statement they paid to the plaintiff as his ten per cent of the profit so made by them the sum of $8,139, thereby admitting that by the use of plaintiff's processes they had made a gain of over $80,000 over and above the gains which they would have made with the old methods. At the end of the year for which this contract ran, but before any account for that year had been stated or settled between the parties, the plaintiff had a conversation with one of the members of defendants' firm in regard to continuing the use of the processes referred to. Plaintiff said that the arrangement for one year had expired, but that the result had not yet been ascertained, and whether he should go on and continue to use his processes. He thereupon was told to go on, as that was all the money there was in the business, and that a satisfactory arrangement would be made with him for the use of the processes. In consequence of this assurance the plaintiff went on and used the processes as before. Subsequently some efforts were made to get at a fixed basis, but without success, and the plaintiff finally left.

These facts now stand established by the verdict of the

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jury. In view of these facts, if the plaintiff was entitled to recover at all, the actual gain in weight during the period in controversy furnished the best basis for computing the reasonable value of the use of plaintiff's processes, and the case was submitted to the jury upon this theory. The jury was instructed to determine what the agreement was between the parties, and, if they found it to be as claimed by the plaintiff, to find the actual gain in weight during the period in question upon the whole evidence, and after paying due regard to the explanatory evidence given by and on behalf of the defendants, and then to award to the plaintiff ten per cent of the profits represented by such gain in weight, if they should think it proper; and if they should not think it proper, and consider such a rate to be excessive, to award such a sum as under all the circumstances would constitute a reasonable compensation. This was all the defendants were entitled to. No request was made that any other question of fact should be submitted. The period for which compensation was claimed consisted of six months and fifteen days, and under the instructions given to them, the jury found a verdict of $3,136. There is sufficient evidence to sustain the verdict for this amount.

The parts of the contract with the National Cordage Company, which were admitted in evidence, were evidently admitted to contradict the testimony of one of the defendants upon a material point, and for this purpose the evidence was competent.

Upon a careful review of the whole case, no exception has been found which calls for reversal.

The judgment and order should be affirmed, with costs.

McAdam and Gildersleeve, JJ., concur.

Judgment affirmed.

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SCOTT *v.* METROPOLITAN ELEVATED R. CO.

(New York Superior Court—General Term, January, 1893.)

In an action against an elevated railroad for past damages to plaintiff's premises, affecting their rental value, caused by the operation of the road, the testimony of a former tenant, that he moved away from the premises in question because they were dark and smoky, is competent and material.

The objection that evidence admitted on the trial was immaterial, cannot be raised for the first time on appeal.

APPEAL from judgment of trial term, entered on verdict of a jury, and from order denying motion for new trial.

Arnold & Green (*L. H. Arnold, Jr.*, of counsel), for plaintiff (respondent).

Davies, Short & Townsend (*Herbert Barry*, of counsel), for defendant (appellant).

GILDERSLEEVE, J. This is an appeal from a judgment, entered on the verdict of a jury in favor of plaintiff, for the sum of $5,722.87, damages and costs. The action was brought by William H. Scott, as executor, to recover damages for injury done to premises No. 36 Murray street by the maintenance and operation of defendant's elevated railroad.

The only exception taken by the appellant's counsel to the admission or exclusion of evidence that calls for any discussion, was to the ruling of the learned trial judge in allowing the former tenant to testify as to the motives which influenced him in moving away from the premises. The question objected to by appellant's counsel, is as follows: "Q. Now, please state to the jury what your reason was for removing from 36 Murray street to your present store in Park place?" To which answer is made as follows: "A. The reason was, it was dark and smoky; and that was my reason."

The learned counsel for the appellant claimed that the question was incompetent and argumentative, as the grounds for his objection. No other grounds of objection than those

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above stated were raised, and no motion was made to strike out the answer. The objection as to materiality, therefore, cannot now be raised. *Sweet* v. *Tuttle*, 14 N. Y. 471; *Union Seminary* v. *McDonald*, 34 id. 379. It is too late to raise the question of materiality for the first time on appeal, when, if the objection had been interposed on the trial, the plaintiff might, if necessary, have withdrawn the question, and consented that the answer be stricken out.

The witness had given similar testimony before, without objection. He had testified as follows: "Q. After they commenced to build the elevated railroad, what effect did it have on your business there? A. The effect was to make it dark, and the smoke and steam had an effect. We could not stay in there." It cannot, therefore, be said that the appellants were prejudiced by the question and answer under consideration.

We are of opinion that the grounds of objection to the question urged by appellant's counsel cannot be sustained. The question, moreover, was a proper one, since the act of moving, and the reasons therefor, of the character given, were material to the issues. Unless it was error for the tenant to state that the impairment of light, and presence of smoke, due to the maintenance and operation of defendant's elevated railroad, was the cause of his moving away, the objection was properly overruled. It is difficult to see what more material evidence could be produced in support of plaintiff's claim for damages to rental value, than the fact that a tenant moved away from the premises, and the foregoing reasons, from his own lips, why he could not stay. Had the removal been due to some other reason than the presence of the defendant's railroad, the fact of removal would have been immaterial. Where the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a case, or reflects important light upon such issue, he may himself be sworn in regard to it. *McKown* v. *Hunter*, 30 N. Y. 628. It is a general rule in criminal cases, that where the intent is an essential element to constitute a crime for which a

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prisoner is on trial, he has the right to testify as to his intent in doing any act which is claimed to prove criminal intent. *Kerrains* v. *People*, 60 N. Y. 221. And the same rule applies to civil actions where the motive or intent becomes material.

The questions of fact arising in the case were properly submitted to the jury, who found in favor of the plaintiff; a fair preponderance of evidence sustains the verdict, and the amount awarded is not excessive.

It follows, therefore, that the judgment and order appealed from must be affirmed, with costs.

McAdam, J., concurs.

Judgment affirmed.

People ex rel. Allen v. Murray.

(New York Superior Court — General Term, January, 1893.)

The judge before whom a summary proceeding to recover the possession of real property is instituted, has no legal power to adjourn the matter to a future day on his own motion in default of an answer by the tenant.

On September thirtieth, the return day of a precept in summary proceedings instituted in a District Court, the justice demanded of the attorney who appeared for the landlord, proof of his authority to appear. The attorney refused to make such proof and moved for judgment and the usual warrant to dispossess the tenant. The justice on his own motion adjourned the proceedings to October third, to enable the attorney to produce proof of his authority to appear. On the adjourned day neither the landlord nor his attorney appeared and the proceeding was dismissed. *Held*, a proper case for a mandamus commanding the justice to do what, on September thirtieth, he ought to have done.

Appeal from an order entered October 17, 1892, under which a peremptory mandamus was issued, requiring the appellant, as justice of the District Court of the city of New York for the eleventh judicial district, to make a final order in summary proceedings and to issue a warrant for the possession of certain premises.

The following opinion was given on the decision of the motion:

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McAdam, J. Assuming for present purposes, that section 1382 of the Consolidation Act (L. 1882) relating to actions in the District Courts, applies to summary proceedings, and that an appearance by the landlord on the return day is necessary to prevent a dismissal of his proceeding, we must inquire whether the appearance by Mr. Secor was not sufficient to satisfy all legal requirements. Mr. Secor was an attorney and counselor, admitted by the Supreme Court to practice law in all the courts of the state. In courts of record his authority would be presumed. *Denton* v. *Noyes*, 6 Johns. 296, followed as an authority in *Vilas* v. *Plattsburgh, etc., R. Co.*, 123 N. Y. 453. True, the rule never applied to Justices' Courts, because there are no attorneys within the professional meaning of that term in these courts. *Hughes* v. *Mulvey*, 1 Sandf. 92; *Fox* v. *Jackson*, 8 Barb. 355; *Sperry* v. *Reynolds*, 65 N. Y. 179. There is another reason. Prior to the Constitution of 1846, and the Judiciary Act of 1847, passed in aid of it, each court of record (even the old Marine Court) regulated the admission of its own attorneys, and had separate rolls on which appeared their honored names. In this manner the attorneys entitled to practice in each court were made known to its judges (See N. Y. Const. of 1777, art. 27), but these regulations never reached the Justices' Courts, which seem to have been regarded as sort of "go-as-you-please" tribunals, in which any one was entitled to practice, whether licensed to do so or not. The power emanated from the client — not the court. The cases cited, founded on the old rule, no longer apply to the District Courts, in which attorneys are recognized as officers by force of express statute. The act of 1857 (Chap. 344, § 30), provides for an extra allowance of costs where an attorney is actually engaged in the prosecution or defense of the action, and by the Laws of 1862 (Chap. 484), it is not only a misdemeanor to practice in these courts without being admitted to the bar, but all the rules and regulations of the Supreme Court are made applicable thereto so far as the same can be made applicable, and those relating to attorneys and counselors may well be so applied in all their rigor. This was evidently the legislative

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intent, and effect must be given to it. *Newburger* v. *Campbell*, 8 Daly, 102. The act of 1862, *supra*, was designed to effect a radical change by driving away from these courts a class of irresponsible, unlicensed practitioners, tolerated under the old rule, by substituting in their stead — under the new one — attorneys of the Supreme Court, whose office protected both court and litigants from all fear of imposition. It was an effort to elevate the tone, character and dignity of the District Court by improving its surroundings. It was a much-needed reform and has worked well. When progress is made its concomitants go with it; all look forward — not backward. Such being the present relation between the District Court and the Supreme Court attorneys, the justice, who knew Mr. Secor was an attorney, had no power to call upon him to produce a special authority to appear for Mr. Allen — his office conferred that right. The tenant did not question Mr. Secor's right to appear, and the justice was not called upon to dispute it.

The nature and extent of the remedy now applied for will next be considered. The distinction is, of course, to be observed between a direction to an inferior tribunal to act and a command by mandamus directing it *how* to act. Thus, mandamus may command the inferior tribunal to act and proceed to judgment, yet it will not, as a rule, prescribe what judgment to give. The mandate is that the officer proceed, adjudicate and exercise his judgment upon the questions of law and fact involved, leaving whatever error may be committed to be corrected on appeal after the decision is filed. While the determination of the inferior court upon the merits will not be controlled by mandamus, yet, if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case and there is no other remedy, mandamus will lie to compel it to proceed. *Costello* v. *St. L. C. Ct.*, 28 Mo. 259. In *People* v. *Mayor, etc.*, 10 Wend. 393, 397, NELSON, C. J., referring to mandamus, said that, "Whenever a legal right exists, the party is entitled to a legal remedy, and when all others fail, the aid of

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this may be invoked." This case and others show that when a specific duty is imposed by statute on public officers, they may be compelled to execute it by mandamus. The office of the writ and its extent are well stated by Chief Justice SPENCER in *People* v. *Supervisors*, 12 Johns. 415, and that is "to require the persons to whom it is directed to do some particular thing which appertains to their office or duty, and which the court issuing it supposes to be consonant to right and justice; and that if the party making the application has a legal right and no other specific remedy, the writ generally goes." The party aggrieved is bound to show us the foundation of the proceeding that the specific act sought to be coerced is the duty of the person against whom the writ is directed, and that such person has no discretion as to its exercise. The statute under which the original proceeding in this matter was taken provides, that "if *sufficient* cause is not shown upon the return day of the precept * * * the justice *must* make a final order, awarding to the petitioner the delivery of the possession of the property." Code, § 2249. The phrase "sufficient cause," to the contrary, means some legal reason why the order should not be made, such as the filing of an answer creating an issue, or the discovery of objections fatal to the proceeding or the jurisdiction of the magistrate. In cases where no such impediment exists, the statute is mandatory that the justice "must" make the final order, and he has no discretion concerning it. While the justice had the right to take whatever time was needed to examine the papers to determine whether they followed statutory requirements, he had no power to unreasonably delay the proceeding, nor had he authority to adjourn it on his own motion without the filing of an answer to the consent of parties (*Ahrens* v. *Burke*, 63 How. Pr. 50), and all his proceedings taken after the return day of the precept are in consequence *coram non judice* and void, and the matter must be treated as if no such proceedings had followed. The writ of mandamus has been given to compel the entering of judgment where nothing remained but the

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mere ministerial duty of making the proper entry. *Williams* v. *Saunders*, 5 Cold. 60; *Smith* v. *Moore*, 38 Conn. 105. Indeed, in a case like the present, the signing of the final order might be considered as merely ministerial, corresponding in this respect with the duty of the clerk of a court of record in entering the judgment of the court, an act clearly enforceable by mandamus. *Smith* v. *Moore*, 38 Conn. 105. The clerk could not, by adjourning the performance of the act for a week or any other stated period, absolve himself from his statutory duty, nor could he then by any act of his declare the proceeding terminated and avoid his duty. There is no substantial difference between the case put and the one now before the court. The statute, as its title indicates, intended the proceeding to be "summary," short, sharp, decisive, and the legislative purpose and intent must be respected. If an answer had been filed, or if objections had been made which necessitated an adjournment or required judicial examination, a case calling for the exercise of judicial judgment might have been presented, and a different question would have arisen, so in regard to motions to adjourn after issue joined. Code, § 2248. The tenant not having questioned Mr. Secor's authority, there was no issue of that kind raised calling for decision, and the justice had no alternative but to obey the plain mandate of the law, by making the final order which the statute requires he shall make, where no legal reasons exist to the contrary. The justice having neglected to perform the specific duty imposed by statute, the party making the application having a legal right to its performance, with no other remedy, and the question being one about which there was no discretion, mandamus, which is a remedial writ, will lie to compel the performance of the duty omitted, and this without infringing any of the elementary rules before referred to. Although of a quasi judicial nature, the act required was purely clerical or ministerial in its character, not calling for the exercise of judgment and admitting of but one result, which was that imposed and specifically pointed out by the statute conferring the authority to act, and as Judge DAVIES,

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in *People* v. *White*, 3 Abb. Pr. 5, held, the justice "not having performed a duty clearly enjoined upon him by law, a mandamus is the proper remedy to compel him to do so," or otherwise there would be a complete failure of justice, the party aggrieved having no other remedy to obtain his legal rights. The relator is, therefore, entitled to a peremptory mandamus commanding the justice to sign the final order as of September 30, 1892, and to issue his warrant thereon in due form (Code, § 2251), that the relator may obtain the possession to which he is by law entitled.

William H. Secor, for relator (respondent).

William Allen, for appellants.

Per Curiam. The relator is the owner and landlord of premises No. 259 West Forty-seventh street, in the eleventh judicial district in the city of New York. On the relator's petition a precept was issued, requiring a tenant to remove from the premises, or show cause before the District Court for said district, on the 30th day of September, 1892, why the possession of the said premises should not be delivered to the landlord. The petition and precept met the requirements of the statute in both form and substance, and the precept was duly served upon the tenant. The controversy arises over what occurred in the court at the time the precept required the tenant to show cause, to wit, the said 30th day of September, 1892. At that time one William H. Secor, for many years a member of the bar of the state of New York, a frequent practitioner in said court, and personally well known to the justice of said court, arose and stated to the court that he appeared as attorney for the landlord in the proceedings under consideration. The justice demanded of said Secor that he show some proof of his authority to appear. Said Secor refused, and failed to show the justice any evidence of his right or authority to appear in said proceedings, and moved for judgment and the usual warrant to dispossess the tenant for nonpayment of the rent; the said tenant, although present,

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having failed to file an answer as required by section 2244 of the Code of Civil Procedure. The justice thereupon, on his own motion, adjourned the proceedings to the following court day, which was the 3d day of October, 1892, for the purpose, as stated by said justice, "of enabling said Secor to produce some proof of his authority to appear for said landlord in said proceedings."

At the adjourned day, on October third, the tenant appeared in person; Secor did not appear, nor was the landlord present or represented by attorney, and thereupon the justice dismissed the proceedings.

Upon the application of the landlord, supported by affidavits, this court thereupon made an order requiring the said justice to show cause why a peremptory mandamus should not issue, directing the said justice to issue a warrant for the possession of said premises, pursuant to the prayer of the landlord's petition. The moving affidavits and the order to show cause were served both upon the justice and the tenant, but the tenant failed to appear. The justice appeared, submitted an affidavit substantially charging Mr. Secor, upon information and belief, with misconduct in prior cases, and claiming this to have been sufficient to call upon him for proof of his authority to appear in the proceeding in question, and a hearing was thereupon had, which disclosed the facts above stated, as well as the additional fact that Mr. Secor had been fully authorized by the landlord to appear as he did, and finally resulted in an order granting the landlord's application, and commanding the justice to make the proper final order and to issue a warrant in conformity therewith. From this order the justice alone appeals. On the appeal, it was conceded that the mandamus has been complied with, that the warrant has been issued and executed, and that the tenant has acquiesced.

The facts being as stated, the substantial question presented by the appeal is whether the said justice had power to adjourn the proceeding to a future day on his own motion, and without an answer having been filed by the tenant. The power to adjourn is conferred by statute, viz., section 2248 of the

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Code, and is to be exercised only at the time when issue is joined at the request of either party, and upon proof that an adjournment is necessary to enable the applicant to procure his necessary witnesses. If sufficient cause is not shown on the return of the precept (which includes a case in which no answer is filed by the tenant), the justice, under section 2249, must make the final order, and under section 2251, must issue his warrant. These sections constitute substantially an incorporation into the Code of Civil Procedure of the provisions of a former statute which had been enacted for the express purpose of giving to a landlord a summary remedy against a defaulting tenant. The remedy thus provided is not an action, but a summary proceeding.

In a case arising under the former statute (*Boller* v. *Mayor*, *etc.*, 40 N. Y. Super. Ct. 523), in which, by the way, a counter affidavit had been filed, it was expressly held by this court at General Term, that in such a summary proceeding there is no power or jurisdiction in the justice to adjourn the hearing, except upon the request of either party, and for the purpose of enabling the party applying, to procure his witnesses, if that should appear to be necessary.

In *Kiernan* v. *Reming*, 7 Civ. Proc. Rep. 311, the same rule was laid down and enforced upon the authority of *Boller* v. *Mayor*, *etc.*, 40 N. Y. Super. Ct. 523, in a case which had arisen under the present Code.

In *Ahrens* v. *Burke*, 63 How. Pr. 50, decided in 1881, the General Term of the Court of Common Pleas, as the appellate tribunal for the determination of appeals from District Courts, expressly held, that even in an action, the justices of the District Courts in the city of New York have no power to adjourn the case without an answer having been filed on the return day.

And in *Deutermann* v. *Wilson*, 15 Civ. Proc. Rep. 411, decided in 1888, the General Term of the Court of Common Pleas, in passing upon the power of the clerk of a District Court to adjourn the court in the absence of the justice, expressly stated that the justice cannot adjourn the hearing

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of a summary proceeding without an answer having been filed.

These four cases have never been overruled by the Court of Appeals and consequently we find ourselves concluded by authority, at least as far as summary proceedings are concerned.

True, there are some cases which seem to lend color to the contention of the appellant, but they can be readily distinguished. *Merwin* v. *Rogers*, 6 N. Y. Supp. 882, and *Horton* v. *Auchmoody*, 7 Wend. 200, were actions, and not summary proceedings, and the question involved related to the personal liability of the justice. In *Boller* v. *Mayor, etc.*, 66 N. Y. 385, there was a request by the subtenant and consent by the landlord.

Some other cases hold that where the parties consent or do not object to an adjournment, the jurisdiction is not lost. But it is not necessary to enlarge upon them, because they do not apply. In the case at bar the landlord appeared by a duly authorized attorney, consented to nothing, waived nothing, and insisted upon his right to the final order and warrant in default of an answer by the tenant.

We also fail to see how the decision of *Boller* v. *Mayor, etc.*, 66 N. Y. 385, can be criticised, as was done in *Goff* v. *Vedder*, 12 Civ. Proc. Rep. 358, by a reference to the decision by the General Term of the Supreme Court, fourth department, in *People ex rel. White* v. *Loomis*, 2 Civ. Proc. Rep. 278.

The case last referred to presented a question as to the time a justice of the peace had in summary proceedings to render his final decision after the submission of the cause to him, and it was held, the statute being silent in regard to it, the provision applicable to an action in the court of such a justice applied, and that under that the final decision should have been rendered within four days after the submission of the cause to him, and in coming to that conclusion the general statement was made that where summary proceedings are instituted before a justice of the peace, all the provisions in respect

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to the mode of procedure in actions in Justices' Courts apply to such proceedings, *except as otherwise prescribed by statute.*

In *Boller* v. *Mayor, etc.*, 66 N. Y. 385, it was held that the statute did prescribe that no adjournment should be had except as authorized by its terms, and this construction of the statute has never been disapproved by the Court of Appeals.

Other questions involved in the application for the mandamus have been so fully discussed by the learned judge who made the order appealed from, that further elaboration is unnecessary.

Suffice it to say that the justice had no power to adjourn the proceeding in default of an answer on the part of the tenant; that the authority of Mr. Secor to appear for the landlord was to be presumed, and that under the circumstances it was the duty of the justice to make the final order and issue a warrant in conformity therewith. And it further appearing on the motion for a mandamus that Mr. Secor in fact had had ample authority to appear for the landlord as he did, and that the tenant had nothing to say in opposition to the motion, the case was a proper one for a mandamus commanding the said justice to do what on the 30th day of September, 1892, he ought to have done.

The order appealed from should be affirmed, with fifty dollars costs and disbursements.

Order affirmed.

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STONEBRIDGE *v.* PERKINS.

(New York Superior Court — General Term, January, 1893.)

A sheriff upon execution against a corporation sold whatever right, title and interest it had in certain personal property previously transferred by it in contemplation of insolvency. No levy was made, and the property was not present at the sale and within the view of the purchasers and the sheriff only purposed to sell whatever interest the corporation had therein subsequent to said transfer. *Held*, that the sale was invalid and did not operate as a bar to an action brought by the receiver of the corporation, to set aside the transfer.

APPEAL by defendants from interlocutory judgment setting aside a certain conveyance or transfer of personal property and ordering an accounting.

The following is the opinion of the court below:

MCADAM, J. The only appreciable defense arises on the sheriff's sale founded on the $100.64 judgment recovered in the City Court, August 6, 1888. The transfer to the defendants, absolute in form, was made prior to that time, and title was passed to them, so that by the subsequent sale by the sheriff of the "right, title and interest" of the vendor, an intangible equity, the purchaser acquired no title that bars a suit in equity by a receiver representing the corporation vendor and all its creditors. The transfer to the defendants was good as against the sheriff's sale; void as to plaintiff. The plaintiff is, therefore, entitled to a decree as prayed for. Findings passed upon and filed.

Dill, Chandler & Seymour and *Charles D. Ridgway* (*Frederick Seymour*, of counsel), for defendants (appellants).

Straley, Hasbrouck & Schloeder (*Frederick R. Kellogg*, of counsel), for plaintiff (respondent).

FREEDMAN, J. The only error assigned upon this appeal is that the learned judge below refused to hold that the sheriff's sale of September 14, 1888, constitutes a bar to this action.

The action was commenced September 15, 1888, by the plaintiff, as the permanent receiver appointed by the judg-

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ment of this court in an action brought for the sequestration of the property of the New York Book Company, to set aside a transfer of personal property made June 1, 1888, by that corporation to Perkins, Goodwin & Co., for an antecedent indebtedness and in contemplation of the insolvency of the said corporation.

At the trial the evidence clearly established, and it is now conceded, that such transfer was void under the statutes of this state.

The sheriff's sale, upon which the defendants rely, took place September 14, 1888, under an execution issued upon a judgment against the corporation in favor of William A. Baeder and Howard R. Kern. Inasmuch as the transfer to Perkins, Goodwin & Co., was void, if the sheriff had levied upon the identical property and sold the same in hostility to said transfer, the purchaser at the sale, under the ordinary rules of law applicable to execution sales of property fraudulently conveyed, might well have become vested with the whole title to the property. And such a result might well have followed whether in such a case the sheriff in form sold the property itself or the right, title and interest of the corporation in the property.

The burden of proof rested upon the defendants, and they were bound to establish by competent evidence such a levy and sale as matter of fact. But the evidence which they did furnish, did not warrant such a finding. In point of fact the sheriff did not purport to act in hostility to the transfer to Perkins, Goodwin & Co., but only purposed to sell whatever remaining right, title and interest the New York Book Company had on and after August 2, 1888.

Moreover no levy was made, and the property was not present at the sale and within the view of the purchasers. No valid absolute sale of the property itself could be made under these circumstances. Code Civ. Proc. § 1428. *Roth* v. *Wells*, 29 N. Y. 471; *Hathaway* v. *Howell*, 54 id. 97.

The defendants, therefore, had no right to a finding contrary to the real facts, and the concession made by the plaintiff that

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the sheriff put up for sale and purposed to sell all the right, title and interest of the New York Book Company which it had on and after August 2, 1888, in and to the said property, is of no help to the defendants.

For the reasons stated the learned trial judge properly refused to find an absolute sale of the property itself, and properly refused to hold that the sale as had constitutes a bar to the present action.

The judgment should be affirmed, with costs.

GILDERSLEEVE, J., concurs.

Judgment affirmed.

HAYES *v.* KERR.

(New York Superior Court — General Term, January, 1898.)

A complaint demanding judgment that certain deeds be declared fraudulent and void as against plaintiffs; that one of the defendants be adjudged liable to surrender possession; that all others claiming under him be forever barred from all claim; that the premises be partitioned according to the respective rights of the parties, etc., is for equitable relief such as cannot be granted at a jury term. If there are issues involved as to which plaintiff may claim a trial by jury, he must have them settled and stated for trial accordingly.

APPEAL from order denying plaintiffs' motion to strike cause from equity calendar.

Geo. Carleton Comstock, for plaintiffs (appellants).

Samuel G. Adams, for defendants (respondents).

FREEDMAN, J. This is an appeal from an order made at the equity term denying plaintiffs' motion to strike the cause from the calendar of the equity term and remand it to the jury calendar. The complaint demands judgment that certain deeds be declared fraudulent and void as against the plaintiffs; that one of the defendants be adjudged liable to surrender possession; that all others claiming under him be forever barred from all claim; that the premises be adjudged to be

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subject to the interests of the plaintiffs; that the premises be partitioned according to the respective rights of the parties, etc., etc. The action is, therefore, for equitable relief, and such relief cannot be granted at a jury term. *Watson* v. *Manhattan Railway Co.*, 53 N. Y. Super. Ct. 137. If there are some issues involved in the action as to which the plaintiffs may claim a trial by jury either as matter of right or in the discretion of the court, the plaintiffs must take the appropriate steps to have them settled and stated for trial accordingly. See *Mackellar* v. *Rogers*, 52 N. Y. Super. Ct. 468; 109 N. Y. 468.

The order must be affirmed, with ten dollars costs and disbursements.

GILDERSLEEVE, J., concurs.

Order affirmed.

COTTON *v.* BURKELMAN.

(New York Superior Court—General Term, January, 1893.)

Plaintiff's husband died, leaving a will, in and by which he gave to her, in lieu of dower, all his property, "to be enjoyed by her to her own use during her natural life," with remainder to their daughter, her heirs and assigns forever. Plaintiff was sole executrix of the will, and had full power to sell the real estate and invest the proceeds thereof for the benefit of said daughter. After the death of testator, the daughter died leaving issue. Thereupon plaintiff contracted with defendant for the sale of the real estate. Thereafter the latter refused to take title on the ground that the death of the daughter deprived plaintiff of the power of sale. *Held*, that the power of sale was intended to be exercised for the benefit of both plaintiff and the daughter; that it was coupled with an interest in plaintiff and did not lapse with the death of the daughter.

APPEAL by plaintiff from judgment dismissing the complaint, with costs. The opinion states the case.

Thos. McAdam (*E. H. Benn*, of counsel), for plaintiff (appellant).

Hamilton R. Squier, for defendant (respondent).

FREEDMAN, J. This action is brought for the specific performance of a contract for the conveyance of certain real

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estate in the city of New York, made between the plaintiff and the defendant. The defendant refused to take title to the said real estate and complete the said contract on the ground that the plaintiff had no ownership of the said land other than a life estate therein, and no power as executrix of the will of German Cotton, deceased, to convey the fee of the said premises. The issues were tried, and the judgment rendered sustains the contention of the defendant.

The substantial facts, as admitted by both sides, are as follows:

German Cotton, who died on the 9th day of March, 1883, seized of the premises in question, left a will, in and by which he gave to his wife, Margaret Cotton, the plaintiff in this action, in lieu of dower, all of his property, both real and personal, "to be enjoyed by her to her own use during her natural life," and upon her death, he gave all of his estate to their adopted daughter, Mary E. Cotton, and to her heirs and assigns forever. He appointed his wife, Margaret Cotton, sole executrix of his will, with full power to sell and dispose of all or any of his estate, as in her judgment might seem best, and to invest the proceeds of the sales, as she might deem best, for the benefit of their said adopted daughter, Mary E. Cotton. After the death of the testator, Mary E. Cotton married George Talbot, by whom she had one child, and thereafter she died leaving that child her surviving. The child is still living. The contract in question was made after the death of Mary E. Cotton. Upon these facts, the specific objection made by the defendant at the trial was that the death of Mary E. Cotton deprived the executrix of the power of selling the property under the authority given in the will, for the reason that the beneficiary under that power having died, the power lapsed. The learned judge below, in his findings and decision, sustained the objection, but in this I think he erred.

The objection would be valid if Mary E. Cotton had been intended to be the sole beneficiary under the power given. In that event, the case at bar would fall within the principle laid down in *Hetzel* v. *Barber*, 69 N. Y. 1, and other similar

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cases, in which it was held that when a power is given by will to sell land for a specific purpose, if the object is accomplished, or ceases before a sale, the power to sell also ceases. This doctrine is firmly settled, but it does not apply here. The intention of the testator must be gathered from the whole will and the surrounding circumstances.

The property was given by the testator to his wife, in lieu of dower, for her own use and support during her life. She is not only to have the whole use and benefit of it as long as she lives, but she is not required to keep it in or as land. She is expressly authorized to sell it and convert it into money or other securities. The reason is quite apparent. The mere use of the land might not at all times furnish a support to her. Suppose the buildings should be destroyed by fire and the lots become vacant in consequence thereof and in that condition yield no income. In such case the widow might not be able to build for the short or uncertain time that she can have the use of the land, and yet she would be required as life tenant to keep down the taxes. The power cannot be construed, therefore, as given for the benefit of Mary E. Cotton exclusively.

The authority is to sell first, and then to invest the proceeds in any way that, in plaintiff's judgment, may best benefit Mary E. Cotton, and the power of sale having been intended to be exercised for the benefit of both the plaintiff and Mary E. Cotton, it did not lapse by reason of the death of the latter.

Moreover, the power in this case is coupled with an interest. The plaintiff is the devisee of a life estate in the land and as such she has an interest in the land under the will. She is to have, during her life, the use of the land and the income which may be derived from it, and, in case of a sale, she is to have the proceeds of the sale, instead of the land, and the use and income thereof. Being thus coupled with an interest, the power for that reason survives the death of Mary E. Cotton.

In every aspect, therefore, that can be properly taken, the fee taken by Edwin Talbot as the child and heir at law of

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Mary E. Cotton to the premises in question under the devise to her, is liable to be defeated by the exercise of the power conferred by the will upon the plaintiff.

For the foregoing considerations the conclusion is unavoidable that the merits of the present controversy have been determined upon an erroneous theory, and that this constituted error.

No point was made below or upon this appeal predicated upon the fact that the contract in this case was executed by the plaintiff, and the action upon it brought by her, in her individual capacity exclusively, and it seems to have been assumed by both parties as well as the trial judge, that in this respect plaintiff's right to the relief demanded is unassailable. That being so, the point has not been presented for review and no opinion is expressed concerning it.

For the error stated the judgment should be reversed and a new trial ordered with costs to the appellant to abide the event.

GILDERSLEEVE, J., concurs.

Judgment reversed and new trial ordered.

BIEN *v.* HELLMAN.

(New York Superior Court — General Term, January, 1898.)

To entitle a party to a discovery of a paper before trial the party applying must show to the satisfaction of the court that it is in writing; that some necessity exists for its inspection, and that its production is essential in the defense of the action.

APPEAL from order made at Special Term denying a motion made by the defendants for an inspection of a paper writing in the possession of the plaintiffs.

George W. Seligman, for defendants (appellants).

F. Bien, for plaintiffs (respondents).

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McAdam, J. The plaintiffs sue upon an express agreement entered into May 22, 1891, wherein and whereby it was agreed that the plaintiffs should do certain theatrical printing and furnish the material therefor, for a play called, "A Wolf's Wedding," at the agreed price of $4,200. The complaint does not state that the agreement declared on is in writing, and as it would be valid without that formality there is no presumption as to how it is evidenced. The defendant and appellant Hellman annexes to his petition an affidavit made by one of his codefendants in which he states that the agreement is in writing, that it was signed by the defendants Jurgens and Reynolds, but not by the defendant Hellman.

Such being the case, the issue is narrowed down to the performance of the work, and the partnership of the defendants, which Hellman denies. There is little room to doubt that the agreement sustains the allegations of the complaint in regard to the work and the price to be paid for it, and that Hellman can in no manner be held upon it except on the theory of partnership in the venture, a fact provable only by evidence *aliunde*. Having proved that the agreement was signed by the codefendants, and not by Hellman (a fact not disputed), there is no conceivable ground for asking an inspection on the theory of possible forgery, as was allowed in *Hepburn* v. *Archer*, 20 Hun, 535.

The mere fact that the plaintiffs may have in their possession the agreement sued upon does not entitle the defendants to an inspection of it, as of course, for whether we observe the old chancery rule as to bills of discovery, pure and simple, or those in which other relief was claimed, some necessity for inspection must exist before it can be directed; curiosity alone will not suffice. Sup. Court Rule 15; *N. E. Iron Co.* v. *New York Loan, etc., Co.*, 55 How. Pr. 351; *Holtz* v. *Schmidt*, 34 N. Y. Super. Ct. 28, and kindred cases. The defendant also insists that the rule declared in *Roosevelt* v. *Ellithorp*, 10 Paige, 417, applies. It was there held that "where the defendant in his answer states the effect of a deed in his possession, without annexing a copy thereof, but for greater certainty *craves leave*

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to refer to the same when produced, he makes it a part of the answer so far as to entitle the complainant to an order for the production of the deed." This had reference to the practice which formerly prevailed of pleading "Oyer" (See Bouvier L. Dic.), but it is now obsolete and, therefore, requires no discussion. *Bright* v. *Currie*, 5 Sandf. 433; 10 N. Y. Leg. Obs. 104; *Mayor* v. *Doody*, 4 Abb. Pr. 127; *Welles* v. *Webster*, 9 How. Pr. 251. The former practice applied only to specialties, and where the plea did not show that the agreement was under seal, profert was unnecessary and oyer not demandable. *Mealey* v. *Met. L. I. Co.*, 23 Fed. Rep. 25. In the present instance, there is no intimation that the agreement sued upon is even in writing, except that furnished by the defendant Hellman, and the description of the paper furnished by him, negatives all idea of its production being essential to any substantial purpose in his defense of the action For these reasons the order appealed from must be affirmed, with costs.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Order affirmed.

DE BAUTTE *v.* CURIEL.

(New York Superior Court—General Term, January, 1898.)

In an action for money "loaned and advanced" the defendants, a copartnership firm, the answer admitted the partnership and denied the other allegations of the complaint. A verdict having been rendered for plaintiffs, defendants appealed and contended that the money was borrowed by their agent for an illegal purpose. *Held*, that such a defense was in the nature of new matter, avoiding a contract, and should have been pleaded.

APPEAL from a judgment entered on a verdict of a jury in favor of the plaintiffs, and from an order denying a motion for a new trial.

E. J. Myers, for defendants (appellants).

M. S. Guiterman, for plaintiffs (respondents).

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McAdam, J. The action is for "money loaned and advanced to the defendants," a copartnership firm doing business under the title of "The United Brewers Company." The answer admitted the partnership of the defendants under this title and denied the other allegations of the complaint. It appears by the evidence that the defendants were an importing wine house, and that their business was to sell different brands of wine.

One Farmer was a traveling salesman employed by the defendants, and was in the habit of spending large amounts of money to boom their wines. About the end of April or beginning of May, 1890, Farmer as the representative of the defendants, appointed the plaintiffs agents in New Orleans for the St. Marceaux, a brand of champagne controlled by the defendants.

It also appears that the defendants told Farmer if he ran short of money to draw on them for whatever was needed to meet requirements, and that his drafts would be honored. Acting on this authority Farmer had a succession of transactions in which money was borrowed and drafts drawn, and in every instance but the present these drafts were honored and the moneys repaid.

There is evidence also that Farmer's authority had been revoked before the loan in suit was made; but there is further evidence showing that, notwithstanding this so-called revocation, the defendants had evidently experienced a change of mind, for they continued to honor Farmer's drafts for loans made up to the time of the very transaction which gives rise to the present litigation.

The case, therefore, turned upon the question whether at the time the loan was made Farmer had subsisting authority to contract the obligation and bind the defendants for its performance. This question was fairly submitted to the jury, who found for the plaintiffs, upon evidence satisfactorily sustaining the finding. This practically disposed of the entire case, and there is nothing left but to consider the exceptions taken, many of which are trivial and without merit.

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The defendants contend that the money was borrowed by Farmer for an illegal purpose. Such a defense is in the nature of new matter, avoiding a contract, and must be pleaded. *May* v. *Burras*, 13 Abb. N. C. 384; *Hopkins* v. *Ensign*, 11 N. Y. St. Repr. 85; *Honegger* v. *Wettstein*, 94 N. Y. 252; *Milbank* v. *Jones*, 127 id. 370; *O'Toole* v. *Garvin*, 1 Hun, 92; and kindred cases.

We have failed to discover any errors in admitting or excluding evidence, and the judgment and order appealed from must be affirmed, with costs.

Judgment and order affirmed.

GERDING *v.* HASKIN.

(New York Superior Court — General Term, January, 1898.)

In an action to recover brokerage for procuring a purchaser for defendant's property, the plaintiff proved his employment to sell; that he found a purchaser to buy on the owner's terms, and that defendants ultimately refused to consummate the sale. The jury found for plaintiff. *Held*, proper; that as there was no proof of inability on the part of the proposed purchaser to perform his contract, ability would be presumed.

It is not proper to refer to the testimony of a witness and ask the court to charge that if the jury believe the witness they must find in a certain way, or that a certain conclusion follows, as it prevents the jury from determining what facts are established by the witness' evidence.

APPEAL by the defendants from a judgment entered on a verdict rendered in favor of the plaintiff, and from an order denying a motion made by the defendants for a new trial. The opinion states the case.

Abel Crook, for defendants (appellants).

C. Bainbridge Smith and *J. Tracey Langan*, for plaintiff (respondent).

MCADAM, J. The action is to recover brokerage for procuring a purchaser for property of the defendants (owned as tenants in common), and known as the Ryer farm, at East

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Tremont, N. Y. The plaintiff alleged and proved his employment to sell for $110,000. (2) That he found purchasers willing to buy on the owners' terms, and (3) that the defendants ultimately refused to consummate the sale. The jury found for the plaintiff and awarded him the usual brokerage of one per cent. The conditions upon which brokerage is earned are not disputed, and the law in regard thereto too well settled to require reiteration. It is sufficient to say without recapitulating it, that the evidence sustains the findings of the jury, a circumstance which requires us to consider with care the specific objections urged against the recovery. *First.* It is claimed that one tenant in common cannot bind his cotenant to sell property or perform any duties in respect thereto. *Van Doren* v. *Balty*, 11 Hun, 241; *Bowman* v. *Travis*, 54 N. Y. 640; *McLean* v. *McLean*, 96 id. 655; *Tuers* v. *Tuers*, 100 id. 200. The answer to this is that the evidence sufficiently shows a joint employment by both defendants. *Second.* That the proposed purchaser must be able as well as willing to perform. *Duclos* v. *Cunningham*, 102 N. Y. 678. This is true, but ability to perform is presumed in the absence of evidence to the contrary, and there was no proof of inability here. *Hart* v. *Hoffman*, 44 How. Pr. 168. *Third.* The defendants rely upon two exceptions; one, to the refusal to dismiss the complaint, which is without merit, because the case on the conflicting evidence presented questions which the jury alone could lawfully determine; the other is to the refusal of the trial judge to charge that, "if the jury accepted the defendant Tappan's testimony, that no commission should be paid until the deed actually passed, no verdict could be rendered for the plaintiff." The trial judge had already instructed the jury that, although a broker becomes entitled to the usual commissions when he brings a purchaser to the owner who is able and willing to take the property, "this may be varied by express agreement." This was stating the law as clearly as the defendants were entitled to have it put. The defendants framed their request in a form which could not be charged, for, as the Court of Appeals said in *Dolan* v. *Dela-*

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ware & Hudson C. Co., 71 N. Y. 285, "it is not proper to refer to the testimony of a witness and ask the court to charge that if the jury believe the witness they must find in a certain way, or that a certain conclusion follows," as it prevents the jury from determining what facts are established by the witness' evidence. See also *McGrath* v. *Met. L. I. Co.*, 6 N. Y. St. Repr. 376. This disposes of all there is to this case, and as no error was committed to the prejudice of the defendants, it follows that the judgment and order appealed from must be affirmed, with costs.

GILDERSLEEVE, J., concurs.

Judgment and order affirmed.

JAQUINTO *v.* BROADWAY AND SEVENTH AVE. R. Co.

(New York Superior Court — General Term, January, 1898.)

Plaintiff by guardian sued to recover damages for injuries sustained by being run over by one of defendant's cars. At the time of the accident plaintiff, then four years of age, was playing with other boys in the street. The proof established that there was no neglect whatever upon the part of the driver and the circumstances indicated nothing from which it could be inferred. *Held*, that a dismissal of the complaint by the trial court was proper.

Held, also, that in such a case where the facts are as consistent with due care on the part of a driver as with negligence, a plaintiff is properly nonsuited.

MOTION by plaintiff for a new trial, after the dismissal of his complaint at trial term, where the trial judge ordered the exceptions to be heard in the first instance at General Term.

Ullo, Ruebsamen & Cochran, for plaintiff (appellant).

Root & Clarke, for defendant (respondent).

MCADAM, J. The plaintiff by his guardian sues to recover $25,000 damages for injuries sustained by being run over by one of the defendant's cars, January 15, 1889. The plaintiff

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was then four years of age, and at 5.30 o'clock in the afternoon, was playing with other boys in Thompson street, near Broome, where he met with the accident of which he complains. The trial judge dismissed the complaint, upon the ground that there was no proof whatever of negligence upon the part of the defendant's driver.

The witnesses all agree that the child was playing about the street with other children; that they were carrying sawdust from the sidewalk, and putting it between the car tracks, and then carrying it back again to the sidewalk. They all agree that the child was struck by the front wheel of the car and run over, in consequence of which he suffered great injury which necessitated the amputation of one of his legs above the knee. They all agree that the car was going at a regular pace or step; that at that hour in the January afternoon it was rather dark; and here the proofs practically end without establishing any neglect whatever upon the part of the driver. It is difficult to discover any valid, legal ground upon which negligence can be inferred in such a case. The accident did not occur at a street crossing, and the car was lawfully proceeding at its usual rate of speed upon its rails through Thompson street. There is no evidence that the driver was incompetent, failed to look ahead, or omitted any care which a prudent driver should have taken, and the fact that the horses did not strike the boy would seem to indicate that he was not immediately in front of the car nor within sight of the driver, but by want of care, ran against the car, was thrown down and run over, by the front wheel. Whether the parents of the boy were negligent in permitting a child of such tender years to play upon the public streets where they knew cars were constantly passing need not be discussed, because if there was no negligence on the part of the defendant's driver, there is no ground whatever upon which the defendant could be held liable for the unfortunate occurrence. The nature of the accident furnishes no evidence of negligence, and the circumstances indicate nothing from which it may be inferred. Mere surmises or conjecture will not do.

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The facts are certainly as consistent with due care on the part of the driver as with negligence, and in such a case, a plaintiff is properly nonsuited. *Hayes* v. *Forty-second St. R. Co.*, 97 N. Y. 259; *Cosulich* v. *Standard Oil Co.*, 122 id. 118; *Baulec* v. *New York, etc., R. Co.*, 59 id. 356.

The presumption is that all men do their duty, and it requires affirmative proof to rebut that presumption. Presumably the driver exercised due care, and there is not a particle of evidence to prove that he did not. For these reasons, the complaint was properly dismissed by the trial judge, the exception taken to the dismissal must be overruled, the plaintiff's motion for a new trial denied, and the defendant permitted to enter judgment on the direction in its favor, with costs.

FREEDMAN, P. J., concurs.

Judgment accordingly.

LOWENBEIN *v.* FULDNER.

(New York Superior Court — General Term, January, 1898.)

In an action to enjoin the violation of a contract, if the restriction imposed thereby is a reasonable one and not against public policy, and it is shown that the common law affords no adequate remedy, the equitable interposition of the court is justified, and an injunction should be granted.

APPEAL by defendant from interlocutory judgment and final judgment restraining him from making, selling or otherwise dealing in a certain sideboard.

FREEDMAN, J. The action is brought to enjoin the violation by the defendant of the stipulations of a contract made between the parties, whereby the defendant engaged to manufacture for the plaintiffs, and not otherwise, a certain article of merchandise known as a sideboard of a certain character and description, according to a special and unique design, and certain working drawings furnished by the plaintiffs.

The restriction imposed by the contract upon the defendant is a reasonable one, and there is nothing in it which is against

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public policy. At the trial the plaintiffs brought their case fully within the principle of the decision of *Saltus* v. *Belford Co.*, 133 N. Y. 499, and also satisfactorily showed that the common law affords them no adequate remedy against the violations, actual and threatened, of the contract by the defendant.

Upon the whole case the equitable interposition of the court is fully justified, and the defendant stands properly enjoined.

The judgment should be affirmed, with costs.

McAdam and Gildersleeve, JJ., concur.

Judgment affirmed.

Zivi *v.* Einstein.

(New York Common Pleas — General Term, January, 1893.)

A denial of a material allegation of the complaint, whether general or specific, may not be stricken out as sham.

An averment of lack of knowledge or information sufficient to form a belief as to such allegation, is such a denial as prevents striking out the answer as sham.

Appeal from order of the General Term of the City Court affirming order striking out answers as sham, and from a judgment of the said General Term affirming the judgment entered on the order so striking out the answers.

The answers denied knowledge or information sufficient to form a belief as to certain allegations of the complaint.

The nature of the action appears in the opinion.

James Murphy, for plaintiff (respondent).

B. F. Einstein, for defendants (appellants).

Pryor, J. The judgment being by default, for want of an answer, is not appealable to this court. *Keller* v. *Feldman* herewith decided.

But, the appellants are not remediless. We have unquestionable jurisdiction to review the order affirming the orde

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striking out the answer; and should we find error in the decision complained of, it will be the duty of the court below to reinstate the answers and try the case on the issues raised.

The action proceeds upon section 34 of the act of 1875, chapter 611, and is prosecuted to enforce against the defendants as stockholders, a debt or liability of the Rubolio Company evidenced by a judgment. It is equivocal on the face of the complaint whether it counts upon the original liability or the judgment; but, take the case in either aspect, and it is sufficiently apparent that the answers controverted material allegations of the complaint.

If the action proceeds upon the original indebtedness of the company, then the answers traverse in due form (Code, § 500) the alleged loan to the company and its present liability therefor, both of which facts it is incumbent on the plaintiff to establish. If the action be upon the judgment, then the answers traverse the judgment, and the company's submitting liability on it, both of which facts it is incumbent on the plaintiff to prove. It is manifest, without more, that the court below had no authority to strike out the answers. *Robert Gere Bank* v. *Inman*, 51 Hun, 97, opinion of FOLLETT, J., collecting all the cases.

It is argued, however, that the action being on the judgment, the defendants are presumed to be cognizant of it, and for support of the proposition our own decision in *Ketcham* v. *Zerega*, is cited with apparent confidence. But there the judgment was against the party himself, whereas here the judgment is against a stranger. *Miller* v. *White*, 50 N. Y. 141. Again, it is urged that the existence of the judgment is not an issue of fact; but in this state the plea of *nul tiel record* is triable by the jury. *Fasnacht* v. *Stehn*, 53 Barb. 650.

But, should there be a judgment in form against the Rubolio Company the defendants may impeach it for defect of jurisdiction, and yet again, should the judgment exist and be valid, the answers imposed upon plaintiff the obligation to prove it still unsatisfied.

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Hence, as the answers, by denial, put in issue essential allegations of the complaint, they cannot be stricken out as sham. *Gere Bank* v. *Inman*, 51 Hun 97.

The argument at the bar ranged over a variety of interesting topics; but, indisposed to anticipate the course of the trial, we are content to adjudicate simply the question before us.

Order reversed. Appeal from judgment dismissed. No costs to either party. Trial directed on the answers stricken out, or any amended answers that may be interposed by leave of the court below.

Order to be settled on notice.

Bookstaver and Bischoff, JJ., concur.

Judgment accordingly.

Keller *v.* Feldman.

(New York Common Pleas—General Term, January, 1893.)

A judgment of the General Term of the City Court affirming a judgment by default, is not reviewable by the Court of Common Pleas.

An order of the General Term of the City Court which affirms an order refusing to open a default, is not an order affecting a substantial right so as to be appealable to the Court of Common Pleas.

Discretionary orders of the City Court are not reviewable by the Court of Common Pleas, except, perhaps, when they exhibit an abuse of discretion.

Appeal from judgment of the General Term of the City Court affirming a judgment by default, and from order of the said General Term affirming an order denying a motion to open the default.

Langbein Bros. & Langbein, for plaintiff (respondent).

John Henry Hull, for defendant (appellant).

Pryor, J. The record shows that when the action was called for trial, the defendant failed to appear, and that thereupon his default was entered, and judgment rendered against him upon an assessment of damages.

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No appeal lies from a judgment by default. The only office of an appellate tribunal is to review the determinations of the primary jurisdiction; and since a judgment by default involves no adjudication upon the issues in controversy, it follows that nothing is presented for revision by the court above. *Flake* v. *Van Wagenen*, 54 N. Y. 25, 28; *Innes* v. *Purcell*, 58 id. 388; *Maltby* v. *Greene*, 1 Keyes, 548. A judgment of affirmance by default is not an actual determination. *Stevens* v. *Clover*, 83 N. Y. 611; *McMahon* v. *Rauhr*, 47 id. 67. By express provision of the Code (§ 1294), a judgment by default is excepted from the privilege of appeal. Thus, reason, authority and statutory enactment concur to the point that the appeal from the judgment must be dismissed for lack of jurisdiction to entertain it.

As to the order upon appeal:

It appears that when the plaintiff moved the cause for trial, the defendant asked an adjournment because of the absence of an alleged material witness. The request for the adjournment being opposed, was denied by the trial judge; thereupon defendant's counsel withdrew from the litigation, and an inquest of damages was taken by the jury. Afterward the defendant moved at Special Term of the court below to open the default and vacate the judgment; upon opposing affidavits, the application was denied; on appeal from the order of denial, it was affirmed by the General Term, and from that order of affirmance an appeal is prosecuted to this court. The question is: Have we jurisdiction to entertain the appeal?

The argument of appellant imports that an order refusing to open a default affects a substantial right, and so is within the terms of the statute defining the appellate jurisdiction of the Common Pleas over the orders of the City Court. Code Civ. Proc. § 3191, subd. 3. But the reasoning is vitiated by a fatal fallacy, namely, in assuming that an order denying a motion to open a default affects a "substantial right." In the sense of this provision of the Code, a substantial right is a strict legal right, enforceable as such, and not resting at all in the discretion of the court. *De Barante* v. *Deyermand*, 41 N. Y.

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355; *Foote* v. *Lathrop*, Id. 358, 361; *Martin* v. *Windsor*, 70 id. 101, 103. Hence, the "universal rule that an order embodying a determination of the court below, which is the result of the exercise of a discretion vested in that court, will not be reviewed in the Court of Appeals, although it affects a substantial right." Baylies on New Trials and Appeals, 217, 517; *Anonymous*, 59 N. Y. 313, 315; *Smith* v. *Platt*, 96 id. 635, 636; *Witkowski* v. *Paramore*, 93 id. 467; *Clyde* v. *Rogers*, 87 id. 625; *Lawrence* v. *Farley*, 73 id. 187; *Jenkins* v. *Putnam*, 106 id. 276. The appellate jurisdiction of this court over the determinations of the City Court being exactly commensurate with the jurisdiction of the Court of Appeals over its subordinate tribunals, it results that we have no authority to review a discretionary order of the City Court. *Robinson* v. *Cornish*, 12 N. Y. Supp. 929 (G. T. Com. Pleas); *McEteere* v. *Little*, 8 Daly, 167; *Walsh* v. *Schulz*, 12 id. 103; *Matter of Adler*, 60 Hun, 481, 483. But whether a default should be opened, is a question of judicial discretion, and an exercise of that discretion by the City Court is not reviewable by us. *Traitteur* v. *Levingston*, 13 N. Y. Supp. 603; *Miller* v. *Tyler*, 58 N. Y. 477, 480; *Walsh* v. *Schulz*, 12 Daly, 103; *Wakefield* v. *Am., etc., Co.*, 13 id. 349; *Robinson* v. *Cornish*, 12 N. Y. Supp. 929; *Judson* v. *O'Connell*, 14 id. 92; *Clute* v. *Mahon*, 9 id. 713; *Depew* v. *Dewey*, 56 N. Y. 657; *Ferris* v. *Ferris*, Id. 614; *Smith* v. *Belden*, 60 id. 642; *Davis* v. *Borst*, 58 id. 669; *Wade* v. *De Leyer*, 63 id. 318; *Matter of Loew*, 90 id. 666; *Stevens* v. *Clover*, 83 id. 611.

The defendant suffered default because of the refusal of the trial court to allow an adjournment, but orders of adjournment are discretionary (*Borley* v. *Wilson*, 12 N. Y. Supp. 45) and hence are not appealable to us from the City Court. Cases, *supra*. Nevertheless, we have examined the papers on the motion for adjournment sufficiently to enable us to say, without hesitation, that in denying the motion the court committed no abuse of discretion. The application for postponement went upon the ground of the absence of an alleged material witness. But, the witness had not been subpœnaed,

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nor had any effort been made to subpœna him or otherwise to procure his attendance. For this defect alone the application was properly denied (*Brooklyn Oil Works* v. *Brown*, 7 Abb. [N. S.] 382), but on reading the record we perceive that the adjournment might well have been refused also on the more substantial ground of justice.

The appeal from the order must be dismissed.

Appeals dismissed, with costs.

Bookstaver and Bischoff, JJ., concur.

Appeals dismissed.

Durant Land Improvement Co. *v.* Thomson Houston Electric Co.

(New York Common Pleas — General Term, January, 1893.)

A judgment for rent pending an appeal with an undertaking effectual as a stay, does not prevent a valid demand of the rent, and a default in its payment opposes no bar to a summary proceeding to dispossess the tenant for nonpayment of the rent for which the landlord has the judgment.

Appeal from final order of a District Court dismissing a summary proceeding to recover real property. In an action by respondent for apportionment of rent the appellant counterclaimed and recovered judgment for the rent for the nonpayment of which this proceeding is instituted. The judgment antedated the demand for rent in this proceeding. After the issuance of execution on the judgment and before the demand in this proceeding, the respondent took and perfected an appeal from the judgment.

Esek Cowen and *Charles J. Hardy*, for plaintiff (appellant).

Wm. B. Putney, *Eugene S. Ives* and *Henry B. Twombly*, for defendant (respondent).

Pryor, J. We have given the case the consideration due to its importance and to the novelty of the point upon which its decision is suspended.

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Whether the order shall stand depends upon the correctness of *three* propositions affirmed by the trial justice in favor of the respondent, namely: That no due demand of the rent was made; that the demand was not made upon the tenant, and that, because of a judgment for the rent in behalf of the appellant, and an undertaking given by the respondent on appeal from that judgment, there was no effectual demand, and so no default.

As to the first proposition. It appears by the return that the landlord made demand of the "amount due for rent;" that the amount due had been ascertained and determined by a judgment between the parties, and that of this judgment the respondent had actual notice. The demand, therefore, was, in effect, of the sum so judicially decided to be due for rent. Demand of the amount of rent due, without naming the amount, is sufficient. *McLean* v. *Spratt*, 20 Fla. 515; McAdam's Landl. & Ten. 681.

In reason, moreover, the tenant may be presumed to be as well apprised of the sum he owes, as the landlord of the sum owing him.

The technicality requisite at common law to a forfeiture of the tentant's estate for rent in arrears has no place in a summary proceeding before a justice; since, manifestly, the strict observance of that technicality is incompatible as well with the nature of the remedy as the character of the tribunal administering it. To complicate and incumber the proceeding with a vain ceremonial that would frustrate its policy and effect, cannot be within the legislative intent.

But, however this may be, it follows from our adjudication in a former litigation between these same parties that no precise amount need be named in the demand for rent, in order to institute a proceeding of summary dispossession. *Durant Land, etc., Co.* v. *East River E. L. Co.*, 15 Daly, 337.

Equally untenable is the position that the demand was not made upon the tenant. That tenant was a corporation, and the demand was made of the person who executed the lease as president of the company, who said he was president, and

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that he had resigned, but his resignation had never been acted on; that as far as he knew, he was president of the company. The statement being merely an extrajudicial declaration, was incompetent evidence; but it was admitted without objection, and, in the case, had all the effect of a valid proof. We are of opinion that, in the absence of countervailing evidence, it is sufficiently shown that the person of whom the demand was made was then president of the respondent company. "To complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign." Willcock on Corporations, 239; 1 Kyd on Corporations, chap. 3, § 4; *Van Orsdall* v. *Hazard*, 3 Hill, 243; *Edwards* v. *U. S.*, 103 U. S. 471; 17 Am. & Eng. Ency. of Law, 169. It is not apparent that this common-law rule has been abrogated in the state of New York. The decision in *Chemical Bank* v. *Colwell*, 132 N. Y. 250, proceeded upon the principle that the director ceased to be such by the transfer of the stock, ownership of which was a necessary qualification for the office. At all events, in the case at bar, it seems from the president's statement that his resignation was contingent on its acceptance.

Avowedly the respondent's real reliance is upon the proposition that, because of the judgment for rent and the stay on appeal, the rent was not legally demandable and a default in payment not legally possible. A demand and a default in payment were requisite to support the proceeding. Code, § 2231, subd. 2.

What, then, was the effect of the judgment and the undertaking on appeal, upon respondent's obligation to pay and appellant's right to demand, the rent?

Indisputably the judgment operated a merger of the cause of action for rent in the sense and with the effect that "all its powers to sustain rights and enforce liabilities terminated in the judgment, and could not again be used as the foundation of a suit between the same parties." 15 Am. & Eng. Ency. of Law, 336. In other words, the claim for rent was transmuted into a higher security, and instead of resting in covenant became a debt of record. But, the right was not

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extinguished; on the contrary it was made certain and invulnerable by the judgment. Nor did the judgment pay the rent, but only authenticated and confirmed the claim to it by an unimpeachable security.

What effect, again, had the judgment on the right to prosecute this proceeding? The proceeding is upon the lease, but is not to recover the rent, and judgment of dispossession does not determine the amount of rent due. *Kelly v. Miles*, 48 Hun, 6.

The proceeding is in pursuit of another independent and collateral remedy available by law to the landlord namely, to recover the land for default in the rent. The right to reclaim possession and the right to recover rent are not inconsistent, for, after dispossession of the tenant he may still be sued for the very rent which was the occasion of his dispossession. That the extinction of the one remedy — an action for rent on the lease, does not involve an extinction of the other collateral and independent remedy — recovery of possession for nonpayment of the rent, is plain upon principle and is settled by authoritative adjudication. "The rule that security of a higher nature extinguished inferior securities will be found to apply only to the state or condition of the debt itself, and means no more than this — that when a judgment is taken upon a debt the debt *as to its original or inferior condition* is extinguished or swallowed up in the higher. * * * It has never been applied and never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. *They are to be canceled only by satisfaction of the debt.*" *Butler* v. *Miller*, 1 N. Y. 496, 500.

"A judgment upon a contract technically merges the demand, but not in so complete a sense that the courts may not look behind the judgment to see upon what it is founded for the purpose of protecting the equitable rights connected with the original relation of the parties." *Clark* v. *Rowling*, 3 N. Y. 216.

The judgment interposing no bar to the proceeding, the remaining question is: was it arrested by the undertaking on appeal from the judgment?

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The contention of the respondent is, that the stay in the action for rent effected by the undertaking, operated a suspension of appellant's right to demand the rent in the proceeding for dispossession, and that as the appellant had no right to demand, the respondent is not in default by refusal.

The effect of a duly perfected appeal is to "stay all proceedings *to enforce the judgment* appealed from." Code, § 1310. In *Ireland* v. *Nichols*, 40 How. 85, 86, the court says: "The proceedings here referred to must be construed to mean such proceedings as may be instituted by the respondent for the purpose of enforcing the provisions of the judgment." In *Morey* v. *Tracey*, 92 N. Y. 581, 583, the court held that a stay on appeal is effectual only against a proceeding "to enforce the plaintiff's rights under the original judgment, or to obtain the fruits *of it*." That the proceeding to dispossess is neither an enforcement of appellant's rights *under the judgment* nor an effort to obtain the fruits of that judgment, is too obvious for argument. Appellant's right under the judgment was to the rent in arrear, and *that* he neither sought to recover nor could recover in the present proceeding. The "fruits" of the judgment were the money thereby recovered, but the object and end of this proceeding is, not that money, but simply possession of the premises.

Nor does a stay on appeal impair or affect the right determined by the judgment, but only arrests all further proceedings to enforce it. *Bowman* v. *Tallman*, 19 Abb. 84; *Matter of Berry*, 26 Barb. 55; *Ward* v. *James*, 8 Hun, 526.

Hence the inevitable corollary, that the judgment and stay on appeal did not impair respondent's liability for the rent or appellant's right to receive it. Both the right and the liability still subsist, and though not in their original form, yet in their original vigor and validity. There was a right, therefore, on the part of appellant, to support its demand, and such a liability on the part of the respondent as made its refusal a default, provided the demand was not under or in enforcement of the judgment. That the demand was not under the judgment nor to enforce its provisions, but proceeded upon

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an independent and collateral right, and to enforce an independent and collateral remedy, is a self-evident proposition. The demand, therefore, was lawful and effectual, and respondent's refusal such a default as entitled appellant to maintain the proceeding.

It is not irrelevant to remark, in construing the policy of the statute, that security on appeal from the order of dispossession itself, would not operate a stay of its enforcement. Code, § 2262; *Broadwell* v. *Holcomb*, 65 How. 502.

Order reversed, and new trial ordered, costs to abide the event.

Bookstaver and Bischoff, JJ., concur.

Order reversed, and new trial granted.

Meislahn *v.* Englehard.

(New York Common Pleas — General Term, January, 1893.)

To review an error of fact, the case must purport to contain all the evidence.

To review an error of law, such certificate is unnecessary.

Appeal from judgment of the General Term of the City Court, affirming judgment on a verdict, and from an order affirming order denying a new trial.

Action for broker's commission.

Gibson Putzel, for defendants (appellants).

Malcolm Campbell, for plaintiff (respondent).

Pryor, J. Counsel for the respondent objects to a consideration of the alleged error of the court below in denying a motion to dismiss the complaint for defect of proof, on the ground that the case does not purport to contain all the evidence. As the rule of practice upon the point appears to be in doubt among the profession, it may not be amiss so to restate it as to avert the possibility of misapprehension.

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Under the former Code, an exception to a finding of fact was notice to the respondent that his adversary intended to assail the finding as erroneous; and if any proof necessary to sustain it was omitted from the case, it became the duty of the respondent to supply it. Hence, on appeal, the presumption was that the case contained all the evidence bearing on the question sought to be presented. But, since under the Code of Civil Procedure, an exception to a finding of fact by the court or a referee is not allowable, the respondent gets no warning of an intention to review questions of fact, unless the case certifies that it contains all the evidence. Otherwise, however, as to questions of law. They are the subject of exception; and such exception itself imports notice to the respondent that the error of law will be challenged on appeal. Hence, all the evidence bearing on the alleged error will be assumed to be incorporated in the case. *Porter* v. *Smith*, 107 N. Y. 531; *Aldridge* v. *Aldridge*, 120 id. 614. Now, a finding of fact without evidence to support it, is error of law; and so, on appeal, the presumption is that the case contains all the evidence affecting such error, and it may be reviewed without a certificate as to the completeness of the evidence. *Halpin* v. *Phenix Ins. Co.*, 118 N. Y. 165; *Van Bokkelen* v. *Berdell*, 130 id. 141; *Spence* v. *Chambers*, 39 Hun, 193.

The cases cited were trials by the court or a referee; but the reason of the rule is equally applicable to a trial by jury, and, accordingly, the rule is prevalent in such trial. *Cheney* v. *New York Central, etc., R. Co.*, 16 Hun, 415; *Cornish* v. *Graff*, 36 id. 160; *Arnstein* v. *Haulenbeek*, 16 Daly, 382.

It follows, therefore, that the exception in the case at bar to the denial of the motion to dismiss the complaint for defect of proof, presents the alleged error for review, notwithstanding the absence of a certificate that the record presents all the evidence.

It is unnecessary to review the evidence in detail. It is enough to say that although on a critical examination we find the proof of plaintiff's case by no means satisfactory, yet, as the evidence appears sufficient to support the verdict, we have

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no alternative but to affirm the judgment. *Bickart* v. *Hoffman*, 19 N. Y. Supp. 472.

Judgment and order affirmed, with costs.

BOOKSTAVER, P. J., and BISCHOFF, J., concur.

Judgment and order affirmed.

CASSIDY *v.* MCFARLAND.

(New York Common Pleas — General Term, January, 1893.)

The proper sum to be taxed by the prevailing party on a decision of the General Term of this court affirming an order "with costs," is ten dollars and disbursement.

APPEAL by the defendant, Frederick Wood, from an order of the Special Term of this court denying the motion for a new taxation of costs. He had appealed to the General Term from an order of reference, and the order was affirmed "with costs." The respondent proceeded to tax before the clerk of the court a bill of costs (ten dollars) and disbursements (nine dollars and six cents) amounting together to nineteen dollars and six cents. Taxation of the bill of costs was objected to on the ground that the order of the General Term did not authorize or empower the clerk of this court to tax any disbursement or costs, nor fix the amount of costs at ten dollars, or any other sum, and that no disbursements can be taxed on a motion, except disbursements for printing.

DALY, Ch. J. The order of the General Term affirmed the order of reference "with costs." It has been held that ten dollars costs, together with disbursements can be taxed under such an order. *Jones* v. *Sherman*, 8 N. Y. St. Repr. 344.

The Code provides that costs of motion shall be a sum fixed by the court or judge not exceeding ten dollars. § 3251. But there is no provision requiring that the costs allowed upon an appeal from an order made upon a motion shall be fixed at a certain sum by the appellate court. It is settled that motion

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costs ordered only can be allowed upon such an appeal (*Phipps* v. *Carman*, 26 Hun, 518), and, as the usual costs of motion are ten dollars, it is to be assumed that that sum is intended by an order affirming "with costs" but specifying no amount.

By section 3256 it is provided that where an allowance of costs is made in an action the party is entitled to his necessary disbursements. It has been held that disbursements of a motion may be taxed by the clerk only where the order expressly directs it to be done. *Ward* v. *Ward*, N. Y. Law Jour. November 19, 1892. That decision prescribed the practice upon a motion, but not upon an appeal from an order. It is nowhere required that the General Term shall tax the disbursements of the successful party, and, where disbursements follow the allowance of costs by the General Term and must be taxed, the authority of the clerk to tax them is from the necessity of the case presumed from the order allowing costs.

The last objection made is, that only disbursements for printing can be allowed upon a motion. § 3251. There is no such restriction upon an appeal from an order.

Order appealed from affirmed, with costs.

Bookstaver and Pryor, JJ., concur.

Order affirmed.

Jakobi *v.* Gorman.

(New York Common Pleas — General Term, January, 1893.)

An order of the City Court opening a default is not appealable to the court of Common Pleas.

Upon an application by indemnitors of a sheriff to be substituted as defendants in an action against him to recover property levied upon by him, it appeared that before any application for substitution, judgment by default had gone against the sheriff without the knowledge of the indemnitors. The answer of the latter disclosed on the application, showed a valid defense, and no objection was made by plaintiff as to their sufficiency to respond in damages. *Held*, that the granting of an order of substitution was an exercise of a fair discretion by the court

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below. That in common justice the indemnitors should have their day in court to make good their defense, especially as the default of the sheriff in answering was wilful.

Indemnitors in an action of this kind are the real parties in interest and the law allows them to intervene for the protection of their rights.

APPEAL from an order of the General Term of the City Court affirming an order of Special Term substituting indemnitors as parties defendant in place of sheriff. The opinion states the case.

Abraham Gruber, for plaintiffs (appellants).

John E. Brodsky, for defendant (respondent).

PRYOR, J. Upon a judgment in an action by Shieck against Schmidt, Gorman, as sheriff, levied on property in the possession of Schmidt; the plaintiffs herein made claim to the property and brought replevin for its recovery, and thereupon Shieck, Offerman and Selje executed a bond of idemnity to the sheriff. The motion is by these indemnitors to be substituted as defendants in place of Gorman, the sheriff. An order of substitution at Special Term was affirmed by the General Term of the City Court, and from that order of affirmance an appeal is taken to us.

The order of substitution was entered the 20th of September, 1892. But, the indemnitors had noticed and withdrawn a previous application for substitution, namely, on the 12th of October, 1891. It further appears by the record, that, on the 17th of June, 1892, before any application for substitution, judgment by default had gone against the sheriff-defendant, and execution thereon issued, that the indemnitors had no knowledge of the default, judgment or execution, until late in the evening of August 15, 1892, "when they were notified by mail that judgment had been entered, and that unless the same was adjusted the sheriff would pay the same on the seventeenth."

No explanation is given of the withdrawal of the twelfth of October motion for substitution, but the obvious inference is

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that it was because of the indemnitors' reliance upon the good faith and diligence of the sheriff in defending the action. Now that their confidence is disappointed they seek an opportunity of protecting their rights.

Being amply indemnified, the sheriff is in no peril from the action, and entire loss, if any there be, must be borne by the indemnitors. Their answer discloses a valid defense, and in common justice they should have their day in court to make good that defense — especially since no question is made as to their sufficiency to respond in damages to the plaintiffs.

Upon the facts before us we are unable to say that, in granting the order of substitution, the court below failed to exercise a fair discretion. *Hayes* v. *Davidson*, 98 N. Y. 22.

An order of the City Court opening a default is not appealable to us. *Keller* v. *Feldman*, *ante*, page 179. But appellants urge that the default of the sheriff was unexcused and inexcusable, and this very fact, namely, that the default was willful, appears to us as sufficient reason for permitting the parties who are not responsible for it and who alone are afflicted by its consequences, to come in and make defense.

Again, the appellants contend that in opening the default the court below committed legal error in this, that the sheriff, then the only defendant, as *dominus litus* alone had the carriage of the litigation, and that the indemnitors, strangers to the action, had no right to control its conduct. The answer is, that the indemnitors were the parties really interested in the defense; that the law allows them to intervene for the protection of their rights, and that the same order which opened the default admitted them as parties to the action.

Order affirmed, with costs.

Bookstaver and Bischoff, JJ., concur.

Order affirmed.

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TUCKER *v.* WERNER.

(Buffalo Superior Court — General Term, December, 1892.)

Defendant repaired for the owner, a buggy upon which plaintiff held a chattel mortgage, duly filed, containing a clause that the buggy should not be removed from a certain barn, but the mortgagor was to have the possession and use of the buggy. The owner not paying for the repairs, defendant kept the buggy. The mortgagee demanded the buggy by virtue of his mortgage, and defendant refused to deliver it, claiming a lien for the repairs and also for storage after the demand of payment. In an action of replevin by the mortgagee, *held*, that defendant's lien for the repairs was superior to plaintiff's mortgage, as in the circumstances it must be assumed that plaintiff impliedly authorized the repairs, and was estopped from asserting that the lien of his mortgage was superior to that of plaintiff for repairs; but *held*, further that the claim for storage was subordinate to plaintiff's mortgage for the reason that no implication arose that plaintiff consented to or was bound to take notice of such charge.

APPEAL from a judgment rendered by the Municipal Court of Buffalo. The opinion states the case.

Charles P. Norton, for plaintiff (respondent).

Tracey C. Becker, for defendant (appellant).

HATCH, J. The action is replevin and the facts are agreed upon. Plaintiff held a chattel mortgage upon a buggy and other property previously owned by one Morgenstern, executed by him as collateral security for the payment, thirty days after date, of a certain promissory note, indorsed by plaintiff for Morgenstern and held by the Bank of Buffalo, and as continuing security for any renewals of the same, or for other indorsements of Morgenstern's paper in an amount not to exceed in all the sum of $284. The mortgage was duly filed, and subsequently renewed as required by law. The possession and use of the buggy, subject to the conditions of seizure and sale contained in the mortgage, remained in Morgenstern, and while so in use, he took the buggy to the factory of defendant and requested him to make certain repairs thereon, which defendant did, amounting in value to

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$25.35. When the same were completed, pay was demanded of Morgenstern, which was refused, and defendant retained possession of the buggy, and now claims a lien thereon for the value of the repairs and storage since the demand for pay, the latter item being reasonably worth one dollar per week. Plaintiff had no knowledge of the delivery of the buggy to defendant, of the repairs made thereon, or of the fact of storage or its charge, until he made a demand upon defendant for the surrender of the property to him by virtue of his mortgage, when the lien for both items was asserted, and delivery of the property was refused until payment made.

Upon these facts, the court below rendered judgment in favor of the defendant and awarded the possession of the property to him. I do not understand, from the case agreed upon, or from the argument of counsel, it is denied, that at common law a lien existed in favor of the mechanic for repairs made of value to the property; contention against it would be futile. *Morgan* v. *Congdon*, 4 N. Y. 553; *Wiles Laundering Co.* v. *Hahlo*, 105 id. 240.

It is, however, earnestly insisted that such lien is subordinate to the lien of a chattel mortgage duly filed, and as applied to the circumstances of this case is inferior to plaintiff's lien. This presents the question to be decided. While the mortgage provides that the mortgaged property is in a certain barn, and that the same is not to be removed therefrom without the written consent of plaintiff, yet, it appearing in the agreed statement of facts that Morgenstern was to have the possession and use of the buggy, the case must be disposed of upon the theory that such use was with plaintiff's knowledge and consent; he thus clothed Morgenstern with authority and dominion over the property, coupled with an apparent ownership. It may also be assumed, from the nature of the repairs as shown by the bill, and the character of the property in constant use, that such repairs were necessary, useful for its preservation, and enhanced its value. If we are right in these inferences, we have a case where the mortgagee authorized a use of the property, clothed the mortgagor with apparent

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ownership, and where the work done has added value to the property. This, as I view the case, brings it within the principle of the decision in *Scott* v. *Delahunt*, 65 N. Y. 128.

It is there laid down as a rule that all mechanics have a lien for labor bestowed, so long as they retain possession of the article, and that where a mortgagee allows another to use the property, and continue in the apparent ownership, prosecuting his business, which necessitates the use of the article, and where such use was contemplated, that such relation raises the implication that the mortgagor may take all necessary steps to preserve the property, and render it fit for use, that under the circumstances necessary repairs are superior to the lien of the mortgage, as the mortgagee has authorized them. It is true that in that case, the mortgagee knew of the repairs being made, and made no objection thereto, and that the mortgage was then due, but in the discussion of the case, no mention is made of those facts as controlling the decision, but therein it is placed upon the ground that possession, use and apparent ownership were in the mortgagor, and he was prosecuting a business with it, and these facts were what raised the implication of right to preserve the property for purposes of use, as it was for the benefit of all concerned. I can find nothing in the case of *Payne* v. *Batterson*, partially reported in 22 Week. Dig. 109, and of which we have been furnished with a manuscript opinion in full, which conflicts with this view. In that case, there was a conditional sale of the property, the title remained in the vendor, he in no wise authorized the repairs, and there were no circumstances from which consent to their performance could be implied. Likewise the case of *Broman* v. *Young*, 35 Hun, 173, is distinguishable. In that case, the work was performed under contract with the mortgagor, the mortgagee having nothing to do about it; true, they knew of the repairs, but they were powerless to prevent them, or consent to them, as the property was not under their control, and at the time they had no right of seizure, and could not by any act of theirs take possession. In the present case, by the express provision of the mortgage, plaintiff was authorized to

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seize and take possession of the property at any time he chose, a very significant distinction. The case of *White* v. *Smith*, 44 N. J. Law, 109, also supports the doctrine here contended for. In that case, the wife was owner of a wagon, which she had delivered to her husband, who used it, and was clothed with apparent ownership; he delivered it to a mechanic, who repaired it, upon the supposition that it belonged to the husband. The lien was supported against an action brought by the wife, upon the ground that the property was enhanced in value, and authority was implied upon the part of the husband to contract for the repairs by reason of his relation to the property, although the wife had no knowledge of the service rendered. Quite similar to the present case is that of *Hammond* v. *Danielson*, 126 Mass. 294. There repairs were made upon a hack, upon which was a chattel mortgage not yet due; it was held that the mechanic had a lien for his repairs superior to that of the mortgagee, although the mortgagee was not informed, and had no knowledge of their performance. This decision went upon the ground that the mortgage contemplated the possession and use of the property, in the prosecution of the mortgagor's business, and as the repairs were necessary to preserve the property and continue it fit for use, authority from the mortgagee to contract for the repairs was to be implied in the mortgagor, and the lien was enforced. As has been already observed in this case, authority for the use of the vehicle, by the mortgagor, in the prosecution of his business, is one of the facts agreed, so there is no difference in principle between the cases. It is claimed that this decision is not sound, and has in fact been overruled. Its unsoundness is claimed to exist in the fact that it applies to the case the doctrine of maritime liens, but the basis upon which maritime liens are upheld, grows out of the fact, that they are essential to the preservation of the vessel, that it may be used in the prosecution of its voyage, thus earning money with which to pay the mortgage debt, and also the difficulty of procuring needed repairs in a foreign port, unless the vessel were the pledge of payment, relieved from other burdens. But what

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difference in principle can there be where a carriage is used for the purpose of earning money to pay a debt and the repairs are essential for the preservation and continuance of earning power? The article may be the very thing which earns the money, like the hack, or it may be a vehicle by which the individual is enabled to carry on an industry, from which he earns what he is obliged to pay. In either event, it is always found, some one of the principles upon which the lien rests and sometimes they are combined, as where the repairs have added value to the property and thereby enhanced the security, or the repairs have preserved the property to enable it to pay the security. I can see no sound distinction in principle between the case cited and the authorities with which the learned judge supported his conclusion, although they may not at all times be applicable to a case where a lien may be upheld based upon some one of the principles noted, or where the lien fails because the principle of maritime liens is inapplicable; it is sufficient to say that the case criticised is not one of either class. The authorities claimed to overrule *Hammond* v. *Danielson*, 126 Mass. 294, have been examined. The case is mentioned in *Storms* v. *Smith*, 137 Mass. 203, where it is said: "The description of the mortgaged hack as 'now in use at the American stables,' was deemed sufficient to express the intent that the hack should be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee but for that of the mortgagor." I am unable to see anything in this, any disposition to depart from the doctrine announced in the prior case, or in the reasoning of the other cases cited both in Massachusetts and in other states, which destroys its force and efficacy as an authority.

There is no doubt of the correctness of counsel for the plaintiff, as to the rights obtained by a chattel mortgage duly filed, but these authorities find no application here, for the reason, that under the facts of this case, plaintiff must be assumed to have impliedly authorized the repairs, and having authorized them he is not now to be heard as asserting a

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superior lien by virtue of his mortgage. I am, however, of opinion, upon the authority of *Storms* v. *Smith*, 137 Mass. 203, that defendant is not entitled to assert a superior lien over the mortgage for storage, and for the further reason that no implication can arise that plaintiff consented to such storage or was bound to take notice of such charge. If these views are correct the judgment must be affirmed.

TITUS, Ch. J., and WHITE, J., concur.
Judgment affirmed.

ECKERT *v.* LEUNERT.

(Buffalo Superior Court — General Term, December, 1892.)

Plaintiff and E. contracted for the purchase of certain premises, assuming a mortgage thereon. There was some interest due on the mortgage. Plaintiff furnished the money to consummate the contract, and by mistake paid the interest to defendant and was obliged to pay the mortgagee the amount of said interest. After the purchase plaintiff acquired all of E.'s interest in the property, and demanded of defendant a return of the interest money, which was refused. In an action to recover the money, plaintiff was nonsuited on the ground of a defect of parties. *Held*, error; that the matter being independent of the real estate transaction, plaintiff alone was entitled to the money.

APPEAL from a judgment rendered in the Municipal Court of Buffalo, dismissing plaintiff's complaint.

W G Kilhoffer, for plaintiff (appellant).

M. A. Gerons, for defendant (respondent).

HATCH, J. Plaintiff and one Enders jointly engaged to purchase of defendant certain premises. By the contract a mortgage was assumed, upon which at the time was some accrued interest. When the parties met to consummate the contract and pay the purchase money, plaintiff, who furnished the money, by mistake paid the interest to defendant, who has ever since kept it, and thereafter plaintiff was obliged to pay the mortgagee the amount of said item. After the pur-

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chase was made, Enders transferred all his right and interest in the property to plaintiff. Thereafter, plaintiff demanded the money overpaid from defendant and upon refusal brought this action, and was nonsuited below upon the ground that there was a defect of parties. I am unable to see how this result can be legally reached. If we assume that the money produced by plaintiff was partnership money, yet it was only so to the interest agreed upon as the purchase price, so that when he made a mistake and overpaid it was his money and his mistake and he alone had an interest in its recovery back, and when recovered it belonged instantly to him. The matter was independent of the real estate transaction; that embraced the land, and its purchase price was a joint charge upon the plaintiff and Enders, but it was limited to that, and when plaintiff made his mistake and paid more money than he should, he was the only one that suffered and the law should right him. It is immaterial to the question whether Enders was liable for a proportion of the money so paid to plaintiff, as that matter would necessarily turn upon questions other than the purchase of the land, like whether he was responsible for the mistake and so forth, but that question would be entirely independent of the joint venture except as the circumstance furnished the occasion for the mistake. Since the mistake was made, Enders has parted with all interest in the land to plaintiff, and now plaintiff seeks to make defendant repay him his money and is driven out of court because he has not associated with him a person who has not the slightest interest in the money. The Code, section 449, commands that every action shall be brought in the name of the real party in interest. As the plaintiff is entitled, and he alone, to the money to be recovered and as it was his money when paid, he would seem to fall within the designation of a party in interest. The action was, therefore, properly brought, and the judgment dismissing his complaint should be reversed, with costs.

Titus, Ch. J., and White, J., concur.

Judgment reversed.

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LAZZARONE *v.* OISHEI.

(Buffalo Superior Court — General Term, December, 1892.)

Plaintiff settled an action to recover for personal injuries, to the prejudice of the defendant, O., his attorney, who had him arrested on a fictitious charge, and when he was discharged had him immediately rearrested upon an order of arrest granted in an action by defendant, O., to recover damages for the claimed fraudulent settlement. Pending an appeal from an order denying a motion to discharge the order of arrest, plaintiff executed and delivered a general release of all causes of action against defendant, O., and his bondsmen on the undertaking given upon obtaining the order of arrest, and was released from imprisonment. The order denying the motion to discharge the order of arrest was reversed, and plaintiff sued upon the undertaking. It appeared that plaintiff was an Italian and could neither read nor speak the English language, and that defendant, O., could speak Italian and English fluently, and was an attorney when the release was given. *Held*, that the release was void for duress and plaintiff was entitled to recover.

The summons and verified complaint in an action brought in the Municipal Court of Buffalo upon an undertaking given upon obtaining an order of arrest must be served by a duly appointed constable or such other person as may be duly deputized by the court. If otherwise served, the court acquires no jurisdiction over the persons of the defendants, and can render no valid judgment.

Objection to the jurisdiction of the court on the ground that the service of the summons and complaint was insufficient, is not waived by proceeding with the case.

APPEAL from a judgment rendered in favor of defendant by the Municipal Court of Buffalo. The opinion states the case.

Edmund P. Cottle, for plaintiff (appellant).

E. T. Durand, for defendant (respondent).

HATCH, J. While the testimony in the court below was conflicting, yet the facts upon which this appeal is to be determined are practically undisputed. It appears that the plaintiff was injured by the Allegany and Kinzua Railroad Company, and thereafter entered into a contract with the defendant, Oishei, to prosecute said company for damages

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sustained. Oishei in consideration of the contract was to receive two-thirds of the recovery, he was to advance money to pay doctors' bills and other charges and employ an attorney to prosecute the claim. An action was begun against the railroad company under this arrangement, and was pending when the plaintiff, intending to deprive said Oishei of the benefits of his contract, secretly settled said action with the company and refused to pay Oishei anything. Thereupon, Oishei made complaint to the police magistrate of the city, upon which a criminal warrant was issued, plaintiff was arrested thereunder, and lodged in jail. What the charge made against him was, does not appear, but Oishei states that plaintiff was "confined in jail four or five days upon the warrant issued by Justice King until the civil proceeding could be instituted." No criminal charge was ever pressed, and plaintiff, having obtained counsel, was taken before the magistrate and discharged, and was immediatoly rearrested by virtue of an order of arrest, issuing out of the County Court of Erie County, in an action brought by Oishei to recover damages for the claimed fraudulent settlement. A motion was thereafter made to discharge the order of arrest, which was denied, and from such decision an appeal was taken to the General Term of the Supreme Court, where said order was reversed and plaintiff was discharged. While the plaintiff was confined in jail, and after an appeal had been taken from the decision of the County Court, but before it was heard in the appellate tribunal, Oishei, at the instance of plaintiff's wife, visited plaintiff at the jail, and stated to him among other things, "If you pay me what you owe me I will let you out right away. I don't want anything more than what you owe me." At another interview Oishei said he would let him out "on the conditions that he would release my bondsmen and release me from all claims and would pay me the amount that he had obtained from me in the month of December, what disbursements I had been put to. He said he would do that. * * * I told him I would furnish him the necessary bondsmen to bail him out." After this

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conversation, plaintiff, while in custody, executed and delivered to Oishei a note for seventy dollars, and also executed, acknowledged and delivered a general release of all causes of action against Oishei and his codefendants. Thereupon a bail bond was executed and plaintiff released. Although the release is not dated, it appears elsewhere that it was in fact executed on the 23d of May, 1891, while plaintiff had been imprisoned since about the twenty-first day of March previous.

When plaintiff made his settlement with the railroad company, said company executed an agreement, in consideration of the settlement, whereby it agreed to protect plaintiff against any action on the part of the attorney on account thereof. After plaintiff was released on bail, he authorized Oishei, in writing, to bring an action for damages on account of his imprisonment, loss, etc., and the action was subsequently brought, and was pending at the time the appeal was heard at General Term. During all the time in which these proceedings were taken, after the arrest of plaintiff under the warrant issued by the police magistrate, the attorney now representing plaintiff, acted for him; he procured his discharge under the warrant, to his hands came the order of arrest, he made the motion to discharge him therefrom, and upon its denial, took the appeal, and subsequently argued it at General Term. When he had succeeded there, and established a liability upon the bond given upon the order of arrest, he brought this action, and then for the first time was confronted with the release; he learned then for the first time what steps had been taken, of which before he was substantially ignorant.

The plaintiff is an Italian, neither reads nor speaks the English language. Oishei speaks both Italian and English fluently; he was not at the time of the first arrest, an attorney, but when the release was obtained, he was admitted as an attorney, and practiced at the bar.

There are many other circumstances not noted here or referred to, all of which are pertinent, but it does not seem necessary to refer to more. The court below held the release a bar to right of recovery, and rendered judgment for costs

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against plaintiff; hence the appeal. I should be disposed to hold, in the absence of any authority, that the note and release, taken from plaintiff, under the circumstances of this case, are void, creating no liability against him, and not affecting defendant's liability upon their bond. Abundant authority, however, establishes such conclusion. There was in this case, duress of imprisonment; plaintiff was imprisoned, first upon a fictitious charge, subsequently was arrested under a claim which did not authorize his arrest, and in order to relieve himself, after long imprisonment, executed the papers. No right of arrest or imprisonment existed in either case, and no paper executed to procure his liberty, bound him. *Foshay* v. *Ferguson*, 5 Hill, 154.

In *Evans* v. *Begleys*, 2 Wend. 243, the court held that a judgment, entered upon a bond and warrant of attorney executed by defendants while in close custody, would be set aside. While in *Guilleaume* v. *Rowe*, 94 N. Y. 272, it was said by Judge DANFORTH: "The instrument on which he relies, was executed by the plaintiff without consideration, and while enduring an imprisonment, which was illegal. It was, therefore, void for duress * * * and the defendants could acquire no right under it," citing with approval the cases before cited. In *Scholey* v. *Mumford*, 60 N. Y. 501, it was said by Judge RAPALLO, in speaking of a person: "When he acts under any species of compulsion, the payment is not voluntary." There the rule was applied in the case of duress of property. The same rule had been before asserted in *Harmony* v. *Bingham*, 12 N. Y. 116. In *Adams* v. *Irving Nat. Bank*, 116 id. 613, many authorities are collected, and the rule finally stated to be, is: "That whenever a party is so situated as to exercise a controlling influence over the will, conduct and interest of another, contracts thus made will be set aside." *Boutel* v. *Owens*, 2 Sandf. 655.

In the present case, it was well known to Oishei that plaintiff had procured counsel at the time he was arrested, a motion had been made, and he had made many affidavits therein, he knew that efforts were being made to set aside the order, and

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must be presumed to have known, that if the order was set aside, his liability attached for damages, growing out of the illegal arrest and imprisonment. At this juncture he procures the release from any liability upon the bond, obtains a note for seventy dollars, procures bail for plaintiff, and thus having security, and release from contingent liability, conceals the same from plaintiff's attorney and argues the appeal from the order. If he had succeeded and the order were affirmed, he could immediately clap plaintiff in jail, by causing his bail, which he controlled, to surrender him, and thus plaintiff would have gained nothing while Oishei ran no risk. Such practices, especially by an attorney, should not be tolerated. certainly not upheld in a court of justice.

Not alone was this the condition, but at the time when the appeal was argued, Oishei was in fact plaintiff's attorney in an action to recover damages for plaintiff's illegal imprisonment of which he had been the cause. It is quite difficult to see how he could, in good faith, act for the plaintiff to redress a wrong which he had caused and at the same time continue a right to further inflict injury of the same kind. Perhaps he thought he was aiding the client by perpetually imprisoning him in order that his damages might be enhanced against the railroad company, as upon no other theory can I see that his services were of any use to his client. Plaintiff does not now, nor at any other time has he expressed a consuming desire to look to the railroad company for damages and undergo further imprisonment. It may be that plaintiff has been guilty of a fraud and a wrong by which Oishei has suffered, but such condition does not authorize such practice as obtained here. The reversal of the order fixed defendant's liability for such expense as plaintiff had incurred and such damage as he had suffered, within the limitations of the penalty of the bond. *Ferris* v. *Tannebaum*, 27 Abb. N. C. 136.

Upon the merits of this case, therefore, plaintiff became entitled to recover. But while the plaintiff, upon the facts as shown is entitled to recover, I reluctantly reach the conclusion that the judgment appealed from must be affirmed, for the

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reason that the court did not acquire jurisdiction of the persons of defendants.

The act creating the Municipal Court of Buffalo, with respect to the service of a summons with a verified complaint, provided, by section 7: "In an action brought in this court arising on a contract for the recovery of money only, or upon account, the plaintiff at the time of issuing the summons, may file with the clerk of said court a written complaint, setting forth, in a plain and concise manner, the facts or items of account constituting the cause of action, specifying the amount actually due from the defendant to the plaintiff and for which the plaintiff will demand judgment." It then provides that such summons and complaint may be served, by any person of full age, not a party to the action, by delivering to and leaving with the defendant, personally, a copy thereof. By section 9 it is provided that if default be made in answering the complaint, defendant shall be deemed to have admitted the allegations of the complaint, and the court, upon the filing of the complaint, with due proof of service thereof, shall immediately enter judgment for the amount demanded in the complaint, with costs, etc., without further proof. These are the only cases in which judgment is authorized to be entered without further proving the cause of action. The act was amended in 1891, and now constitutes a part of the charter of the city of Buffalo, but the provisions of law in the afore-mentioned regard were re-enacted intact. Laws 1891, chap. 105, § 459.

These sections resemble closely the Code of Procedure, except that the latter required the statement of the demand in the summons. Its language was: "In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein." Subd. 1, § 129. And by section 246 it was provided, among other things, for the entry of judgment upon default, if the summons and verified complaint was served, judgment was to be entered in conformity with the demand contained in the summons; if complaint not sworn to or served, then the clerk was required to

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take proof, etc. It is to be noticed that the sections of the Code, and the Municipal Court Act, are practically identical in language; both say in actions "arising on contract for the recovery of money only." These sections have been the subject of judicial construction many times. In *Mason* v. *Hand*, 1 Lans. 66, it was held that when the causes of action arise on a contract for the payment of a sum of money only, if such sum sued for, was certain in amount or capable of being certainly reached by computation, then the summons was to be issued under subdivision 1 of section 129, but that in actions to recover damages for a breach of contract, when such damage depended upon proof extrinsic the contract, then the summons was to be issued under subdivision 2 and application for judgment must be made to the court. The court cited with approval, *Tuttle* v. *Smith*, 14 How. 395, and other cases holding the same doctrine. *Bates* v. *Reynolds*, 7 Bosw. 691, approves this rule. In *Levy* v. *Nicholas*, 15 Abb. 63, it was held in an action upon an undertaking, similar in character to this, application must be made to the court for judgment.

The Code of Civil Procedure, section 420, supersedes the section referred to, but its only effect is to enact in a statute what the courts had before decided. It follows from this construction that the present is not a case where the plaintiff could file and serve a verified complaint and enter judgment thereon without making proof of his cause of action, *aliunde* the allegations of his complaint, and establishing the damages he had sustained, and as there is no other provision of law for the service of a verified complaint, entered in the Municipal Court, it follows that plaintiff acquired no legal rights flowing therefrom. When the parties appeared before the judge, defendant objected to the jurisdiction of the court upon the ground that there was no sufficient service of the summons. This objection raised the question of jurisdiction of the person of the defendant. Reference to the proof of service of the summons shows it to have been served by a person not a constable, but was made by a person such as is provided for

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where it is proper for the service of a verified complaint. As we have seen, this was not authorized, in consequence of which, authority for such service, must be sought elsewhere. By section 471, Laws of 1891, chapter 105, it is provided: "No person shall execute the process of the court except the constables duly appointed, and such other persons as may be deputized in the manner now provided by law." The person making the service was not a constable, and no claim is made that he was deputized in any manner, consequently he was not such person as could execute the process, and the court did not obtain jurisdiction of the person. It is urged that he waived this objection. But it appears that he objected, that the court overruled his objection. He was then either compelled to appear or suffer judgment by default to pass against him. I do not understand that an appearance and litigation under such circumstances has ever been held to constitute a waiver of the question of jurisdiction of the court. On the contrary, every adjudicated case that has fallen under my observation refutes such doctrine. *Avery* v. *Slack*, 17 Wend. 85; *Dewey* v. *Greene*, 4 Den. 93; *Horton* v. *Fancher*, 14 Hun, 172; *Nickerson* v. *Ruger*, 76 N. Y. 283.

It follows that as the court never acquired jurisdiction it could render no judgment against defendant. The order entered herein will show that the determination upon the merits is reversed and that judgment of affirmance passes upon the sole ground that there was no proper service of the summons upon defendants. The judgment is, in this respect, affirmed, without costs as to either party in this court.

WHITE, J., concurs.

TITUS, Ch. J., dissents, and favors affirmance of the judgment on the sole ground that the court obtained no jurisdiction of the defendant, and not upon the merits.

Judgment affirmed.

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JACKSON *v.* HOVEY.

(Buffalo Superior Court—General Term, December, 1882.)

Where the original verified complaint filed in an action brought in the Municipal Court of Buffalo demands judgment for a greater sum than does the copy of the complaint served on the defendant, who appears and defends, plaintiff upon proof, is entitled to a judgment for the amount demanded in the original complaint

Clinton B. Gibbs, for plaintiff (respondent).

Walter S. Jenkins, for defendant (appellant).

TITUS, Ch. J. This action was brought in the Municipal Court to recover of the defendant for work and services as hostler, in taking care of his horses, and the plaintiff, in his complaint, claims for three months' services at the rate of twenty dollars per month, less the sum of twenty dollars which the defendant has paid him.

The complaint, as it appears in the return, demands a judgment for forty dollars and costs. It appears from the affidavits accompanying the return that the copy of the complaint, which was served upon the defendant with the summons, demanded but twenty dollars judgment. The complaint, on its face, shows that the plaintiff is entitled to forty dollars. It further appears from the affidavits that when the complaint was originally prepared, the typewriter copy contained the demand for twenty dollars; that before it was verified and served, the demand was changed in the original complaint from twenty to forty dollars, but that the mistake was not corrected in the copy served upon the defendant. This seems to be conclusively established by the plaintiff's affidavits, which are not in that particular disputed by the affidavits of the defendant.

The Municipal Court Act, under which the Municipal Court of Buffalo was organized, is now incorporated into and forms a part of the revised charter of the city. By section 459, in an action arising on contract for the recovery of money only, the plaintiff, at the time of issuing the summons, may file

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with the clerk of the court a written complaint setting forth in a precise and concise manner the facts constituting his cause of action, specifying the amount actually due from the defendant to the plaintiff, and for which the plaintiff will demand judgment. The complaint must be subscribed by the plaintiff or his attorney, and verified in the manner prescribed by the Code of Civil Procedure, and must, together with the summons, be served upon the defendant. By section 461 it is provided that "in case the defendant fails to answer the complaint, as herein provided, he shall be deemed to have admitted the allegations of the complaint, and the court, upon the filing of the summons and complaint, with the proof of due service thereof, shall forthwith enter judgment for the amount demanded in the complaint without further proof."

These provisions are practically the same as the sections of the old Code, where the action arose upon contract for the recovery of money only, the complaint was required to be served with the summons, which must state the amount claimed, when the clerk could enter judgment without application to the court. The practice is practically the same under the present Code of Civil Procedure. §§ 420, 1212.

Section 1207 provides that when there is no answer the judgment shall not be more favorable to the plaintiff than demanded in the complaint. When there is an answer the court may permit the plaintiff to take any judgment consistent with the case made and embraced within the issue.

It was held in *Trowbridge* v. *Didier*, 4 Duer, 448, that the defendant has the right to consider the complaint which is served upon him as that which he is required to answer, but under the Code no variance between the allegations of a plaintiff's pleading and the proof can now be material, unless it is shown that the adverse party was actually misled. So it is provided by the Municipal Court Act, section 458, that "a variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby," and the pleading may be amended at any

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time, even upon appeal, when by such amendment substantial justice will be promoted.

It cannot be seen how the defendant has been prejudiced. A defense was made in the court below to the whole of the plaintiff's case, and he resisted a recovery for any sum. The demand for judgment was not a material factor in the case. The result would not have been different if the defendant had raised the objection upon the trial, as the court would have been obliged to allow an amendment making the demand correspond with the proofs; but no amendment was necessary. The complaint, as it was verified and filed with the court, demanded judgment for forty dollars.

If the defendant had not appeared in the court below a different question would be presented. The plaintiff could not then have taken judgment against the defendant for a greater sum than that demanded in the copy served upon him. This provision for taking judgment by default for the amount demanded in the complaint has no force or application where the defendant appears and answers, as he may do. § 460. The issue is then joined, and the rules applicable to ordinary proceedings in that court control, and the complaint in the action filed with the court fixes the rights of the parties, the cause of action and the amount he is entitled to recover.

The case of *Pharis* v. *Gere*, 31 Hun, 444, cited by the defendant's counsel upon his brief has no application. There the court would not allow the plaintiff to amend his complaint so as to recover treble damages which were awarded plaintiff, but limited him to the amount claimed in the complaint. As has been stated, no amendment was necessary here, as the complaint claimed an amount large enough to cover the verdict.

The proceedings in Justice's Court which apply to the Municipal Court (§ 457, Revised Charter), are necessarily informal, and great particularity is not required. Section 2440 of the Code of Civil Procedure provides that a party may state his claim to a justice of the peace, and he need not formally demand judgment for any sum, but in making his

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proof the justice will give him such judgment as the proof warrants, within the limit of his jurisdiction. It seems to me, therefore, that the judgment should be affirmed, with costs.

Judgment affirmed.

DUNN *v.* ULTSCH.

(Buffalo Superior Court — General Term, December, 1892.)

In an action to recover wages, plaintiff was charged by defendant with tampering with the cash register so as to defraud defendant of the receipts. It appeared that the register had been opened and that others had access to the register equally with the plaintiff. The court charged that the jury must find that plaintiff took any goods corruptly and wrongfully. *Held*, no error.

The court charged, on request, that there was no evidence that would justify a finding that plaintiff took any money wrongfully. *Held*, no error; that as the charge of the court did not accompany the return it could not be said with the request standing alone, that it was not modified by the court in its charge to the jury.

Defendant after testifying that he had never found any mistake made by the cash register, was asked "whether it was an accurate machine?" The court refused to allow him to answer. *Held*, no error; his opinion was incompetent.

J. W. Russell, for plaintiff (respondent).

Emery & Sickmon for defendant (appellant).

TITUS, Ch. J. This is an appeal by the defendant from the Municipal Court. Various errors are claimed to have been committed on the trial, but none of them seem to be sufficient to warrant a reversal of the judgment.

The first error complained of is the refusal of the court to allow the defendant on his direct examination to answer the question "Whether it was an accurate machine?" The question clearly calls for the opinion of the witness. He had already stated that he always found it to register correctly, the cash in the drawer corresponding with the amount shown by the register, which amounted to saying he had never found any mistake made by the machine. This is as far as the defendant can go. His opinion was not competent evidence.

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The proof is not at all conclusive that a correct inventory showed that the defendant had $632 in stock in the store when he was taken sick. He did not measure the liquors, the vessels which contained them were not full, nor did he count the cigars, and the jury probably came to the conclusion that his testimony was not of that precise and accurate character which entitled it to great weight, in view of the fact that no inventory was produced in court, and of the further fact that the store was robbed and some of the property stolen.

The witnesses were before the court, the jury had an opportunity to see them, and their manner of testifying, and of judging whether the defendant's testimony was to be taken against the other circumstances in the case. They are the best judges of that fact, and the court cannot interfere with their conclusion.

It is claimed that the court erred in charging that a person who employs a minor takes all chances of his negligence and carelessness, and that his carelessness is no defense to his recovering his wages. It is a sufficient answer to this to say that the question of the plaintiff's carelessness was not before the court, and if the court did err on a question of law not properly before it, the judgment will not be reversed on that account.

The defendant is charging the plaintiff with tampering with the register so as to defraud him of the receipts and with not turning over the funds belonging to him. If he did so, his acts were wrongful and criminal, and when the court charged that the jury must find that the plaintiff took these goods corruptly and wrongfully, it was in accordance with the theory of the defendant's case. While the defendant has waived the tort in his answer, as he may, yet the acts charged against the plaintiff are more or less tortious, if the defendant's claim against him is true. He simply waives the right to sue for the wrong, and seeks to recover in assumpsit. I do not think the court erred in charging that there was no evidence that would warrant the jury in finding that the plaintiff took

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any money wrongfully from the register. The charge by the court does not accompany the return, and we are unable to say, with this request standing alone, that it was not modified by the court in his charge to the jury.

There was evidence that the register had been opened; the plaintiff has no key; the register corresponded with the cash in the drawer. Others had access to the register equally with the plaintiff, and the single statement of the defendant that he left the card in the register with "No. 183" marked upon it, as indicating its position when he last opened it before his sickness, and the number 186 when he opened it after his sickness, I do not think was sufficient to charge the plaintiff with having wrongfully taken money.

This disposes of the objections raised by the defendant, and I think the judgment must be affirmed, with costs.

HATCH and WHITE, JJ., concur.

Judgment affirmed.

WEISS *v.* TENNANT.

(Buffalo Superior Court—General Term, December, 1892.)

W., a member of a benefit society, on June third, paid fifty cents for five months' dues, up to June first. On June fifth he died. The by-laws did not require dues to be paid in advance, but provided that any member being three months in arrears should not be considered "in benefit," until one month after he was clear on the books, and also that no member three months in arrears for dues, should be eligible to receive a funeral benefit of fifty dollars. *Held*, that W. was entitled to a funeral benefit. The by-laws further provided that new members were not eligible to receive a funeral benefit until six calendar months had elapsed after initiation. *Held*, that it appearing that W. was a member at the time of his death, it was matter of defense to show that he had not been a member the required length of time.

Henry W. Brendel, for plaintiff (appellant).

Frank M. Loomis, for defendant (respondent).

TITUS, Ch. J. This action was brought in the Municipal Court to recover fifty dollars for funeral expenses incurred in

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burying the husband of the plaintiff, as provided by the by-laws of the defendant.

The Stone Cutters' Asssociation is an incorporated joint-stock association, of which the defendant Tennant is treasurer. Henry Weiss, the deceased husband of the plaintiff, was a member in good standing before and on the 1st day of January, 1891. He died on the fifth day of June, with his name on the roll of membership of the association. It appears from the by-laws, article XXVI, section 1, that the membership dues shall be twenty-five cents a month, but in the statement of facts stipulated by the attorneys for the respective parties, the monthly dues of members are ten cents. As the statement of facts stipulated is controlling as to what was the amount of monthly dues, it is assumed that ten cents was the amount required to be paid.

On the 3d day of June, 1891, Weiss caused to be paid to Michael Scheade the sum of fifty cents for five months' dues, which said Weiss owed at that time. Michael Scheade was a "shop steward," who, on the eighth day of June, paid said sum of fifty cents to the financial secretary at a meeting held on that day, which sum was received by the association and credited to Weiss. This, under the stipulation of facts, would pay the dues which Weiss was owing the association up to the first day of June. By article XXXII, section 2, of the by-laws, it is made the duty of the "shop stewards" to collect the initiation fees, dues and all moneys belonging to the association. This section authorized Scheade to receive the money for Weiss' dues, and constituted him the agent of the defendant for that purpose, and a payment to him was a payment to the society. There is nothing in the by-laws prohibiting a member three months in arrears for dues from paying, and when he paid the officer designated to collect and receive dues it was a payment to the association, and whether Scheade turned it over to the financial secretary before or after Weiss' death does not affect this question. By article XXIV, section 3, any member being three months in arrears shall not be considered "in benefit" until one month after he is clear on the books. The benefits

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to which this section relates are not very clearly pointed out by the by-laws. The association was organized to benefit its members by regulating the price of labor and all other matters appertaining to the trade, and it assumes to say who of its members shall work and when they shall work and the price per day they shall receive and the number of hours they shall work. A member of the association on a strike shall receive from the association six dollars a week; a system of fines and penalties is provided for members who violate the rules of the association. The benefits contemplated by the section evidently refer to the advantage of constant employment, of indemnity for the loss of time in case of a strike, and the facility of employment which a membership in the association affords.

By article XXXVII it is provided that this union shall appropriate the sum of fifty dollars towards defraying the funeral expenses of deceased members who are clear of all fines and in good standing, but no member will be eligible for this provision who is three months in arrears, nor new members until six calendar months have elapsed after date of initiation.

So far as anything appears in the case, the deceased was in good standing and clear of all fines, and was not at the time of his death three months in arrears for dues, his dues having been paid to the "shop steward" up to the first of June preceding his death and while he was yet alive. Nothing in the by-laws requiring dues to be paid in advance, his dues for June could be paid at any time during the month. He was not in arrears for his dues for June, as they were not payable until the end of the month.

I do not think the by-law providing that members who are in arrears for three months shall not be considered "in benefit" has reference to the provision for defraying funeral expenses of deceased members. The by-law fixes the condition upon which such appropriation for funeral expenses shall be made, and there is nothing in the conditions, namely, "clear of all fines and in good standing and not three months in arrears for dues," which applies to the deceased.

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The objection that the deceased had not been a member for six months is not well taken. It does not appear when he was made a member, except that he became a member on or before January 1, 1891. He was a member at the time of his death, and it was a matter for the defense to show that he had not been a member the required length of time. The court will not presume, in the absence of proof, that he had not been a member for six months, as must be done to sustain the objection.

I think, therefore, that the judgment of the court below must be reversed, with costs.

Judgment reversed.

CITY OF BUFFALO *v.* SCHLEIFER.

(Buffalo Superior Court — General Term, February, 1893.)

A municipal charter authorized its common council to license and regulate hawkers, peddlers, etc., and to regulate the sale of meats, fish and vegetables. *Held*, that an ordinance prohibiting the peddling of fruit, garden or farm products in the public streets between five o'clock in the morning and one o'clock in the afternoon was valid.

George M. Browne for plaintiff (respondent).

George A. Lewis for defendant (appellant).

TITUS, Ch. J. This action was commenced in the Municipal Court by civil warrant against the appellant for a violation of section 4, chapter 17 of the city ordinances.

By subdivision 6, section 17 of title 2 of the charter, the common council is authorized to enact ordinances to license and regulate cartmen, owners and drivers of all vehicles used for the transportation of passengers or property for hire, and to fix the rate of compensation to be taken by them, to license and regulate plumbers, auctioneers, butchers, hawkers, peddlers and pawnbrokers * * * etc." By subdivision 8 of the same section the common council may "regulate the sale of meats, fish and vegetables."

Under one or both of these provisions the common council

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has enacted ordinances prohibiting and regulating various businesses relating to health, good order and government of the city. Among others it is enacted that "No person or persons shall hawk or peddle fruits, garden or farm produce in the public streets of the city of Buffalo, between the hours of five o'clock in the morning and one o'clock in the afternoon of each day, under a penalty of ten dollars for each and every offense." § 4, chap. 17, city ordinances.

The defendant has a peddler's license issued pursuant to the charter, authorizing him to sell green garden and farm produce throughout the city subject to the laws and ordinances of said city, and to all existing regulations imposed by the common council.

On the 23d day of June, 1892, the defendant was peddling strawberries and vegetables on Ellicott street, a public street in the city, between ten and eleven o'clock in the morning, visiting from house to house, and selling to the inhabitants his fruits and vegetables. These are the acts complained of which are claimed to constitute a violation of the ordinances of the city, and for which he was brought before the Municipal Court to answer.

The power to license hawkers and peddlers existed at common law, and has been exercised from time immemorial in this state, either under the common law, or by virtue of an act of the legislature.

This power has been delegated by the legislature to the municipalities of the state, and within the limits of the various cities that power is now exercised by the city authorities.

It is not claimed that the defendant is not a peddler within the meaning of the ordinance, nor that the city has not power to regulate and license peddlers, but it is insisted that the ordinance is not a regulation but an unlawful restriction upon the right of the defendant to use the public streets of the city to peddle and sell farm produce, and that it is a prohibition in that it forbids the sale of farm produce by peddling on the streets by any person within the hours of five o'clock in the morning and one o'clock in the afternoon.

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It may be assumed for the purpose of the question here presented, that the common council would not have the right to prohibit the peddling of farm produce at any time, although the question is not before us and we do not intend to pass upon it. The sole question presented for decision is, is the regulation a reasonable one, or does it prohibit the carrying on of a lawful business? It needs no citation of authority to hold that where the common council is empowered to regulate traffic, the regulation to be upheld must be reasonable in view of the evil sought to be remedied. *Dunham* v. *Trustees of Rochester*, 5 Cowen, 462; Dillon on Mun. Corps. § 357.

We cannot agree with the counsel for the defendant that the ordinance is prohibitory or in restraint of trade and void. It is clearly within the power conferred upon the common council by the charter, and such provisions have been held not to be in restraint of trade. *City of Brooklyn* v. *Cleves*, Hill & Denio Supp. 231; *City of Brooklyn* v. *Breslin*, 57 N. Y. 593.

In *Village of Buffalo* v. *Webster*, 10 Wend. 100, it was held that an ordinance which enacted that it should not be lawful for any person within the limits of a corporation, during certain months, to hawk about or sell by retail any kind of fish, beef, pork, lamb or mutton, except at the public markets or within certain limits around the same, was a valid ordinance; that a by-law for the regulation of trade and imposing particular restraints as to time and place was good and not in restraint of trade, but a regulation of that right.

We think the ordinance is within the power conferred upon the common council by the legislature and fairly deducible from the language used, to license and regulate peddlers. It does not seem, in view of the circumstances of this case that it is unreasonable or open to the criticism of the learned counsel in his brief. It does not follow that because the council may fix a time within which certain things are not to be done, it may probibit them altogether. The city has established, at large expense, markets where the people may conveniently be

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provided with everything necessary for family use, and where hucksters and peddlers may vend their wares. It has established a system of food and meat inspection and prescribed ordinances against the sale of unhealthy or diseased meats and vegetables for the health, comfort and convenience of the citizen. Its officers and employees are there to see that only fresh vegetables and healthy meats are sold, and it would seem not unreasonable that during market hours persons should be permitted to sell only at such places as the city has or may designate. It is a safe and reasonable police regulation, intended to promote the health and well being of all. The street is a public highway intended for and devoted to the transport of goods and passengers from place to place, and not a public mart where goods may be exposed for sale without regulation or restriction by the public authorities, and when they have in the language of one of the cases above cited only imposed a restraint as to time and place in which hucksters and peddlers may ply their vocation, it does seem to us to be neither unreasonable nor in restraint of trade or in violation of any right or privilege which the citizen has in the public highway.

The judgment should, therefore, be affirmed, with costs.

White, J., concurs.

Judgment affirmed.

O'Leary *v.* McDonough.

(Buffalo Superior Court—Trial Term, February, 1893.)

In an action upon a written instrument purporting to be a contract, parol evidence is admissible to show it does not express the contract between the parties.

Upon the trial, defendant obtained the verdict of a jury, which plaintiff moves, upon the minutes of the court, to set aside.

George T. Wardwell, for plaintiff.

George H. Frost, for defendant.

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HATCH, J. The motion presents a single question; stated, it reads: Can a written contract, complete in all respects, executed and delivered by the person sought to be charged, be shown not to be in fact the contract between the parties; but that in fact such contract was executed and delivered for a particular purpose, and to defeat a right of action thereunder, can the real contract resting in parol be shown? Notwithstanding the multitude of words upon oral argument, and the length of brief as a silent monitor, I am convinced that this question has long been settled by authority. Simply stated, the question is, may a paper appearing to be a contract be shown not to be such? In *Grierson* v. *Mason*, 60 N. Y. 394, evidence of this character was held competent for the precise purpose for which it was offered here, and a result similar to the one reached in this case was upheld. The rule therein announced has never been departed from by any well-adjudged case since, and whenever cited, its approval has been uniform. *Union Trust Co.* v. *Whiton*, 97 N. Y. 177; *Schmittler* v. *Simon*, 114 id. 184; *Thomas* v. *Scutt*, 127 id. 133–138. In the latter case, it is said, in speaking of the rule: "The real exceptions may be grouped into two classes, the first of which includes those cases in which parol evidence has been received to show that that which purports to be a written contract is in fact no contract at all. * * * Such proof does not recognize the contract as ever existing as a valid agreement, and is received from the necessity of the case to show that that which appears to be, is not and never was a contract."

In *Grierson* v. *Mason*, 60 N. Y. 394, it is said: "Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy or effect."

This language answers every objection urged. While it may be possible to pick up isolated answers of defendant, tending to show that the contract was to evidence the relation between the parties, yet his answer and his testimony, taken as a whole, authorized the jury to find that the contract relied

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upon was not the contract between the parties. The motion is, therefore, denied, with costs.

Motion denied.

Matter of Jones' Estate.

(Surrogate's Court — Westchester County, January, 1893.)

A surrogate has no jurisdiction to try and pass upon the validity of a claim due from the estate to a firm of which the executor is a member.

In such a case, the executor may pay the firm, and on filing a voucher therefor, ask credit for the amount on the accounting, at which time any interested party may question the propriety of its payment.

On the accounting in this matter, the executor presented, and proposed to prove, a claim belonging to the firm of Jones, Hall & Co., which consisted of an alleged balance of account against the testator, amounting to about $2,000. The executor was a member of the firm. The claim was contested by Mrs. Martin and Mrs. Gage, daughters of the deceased, and residuary legatees, and it was objected on their behalf that the surrogate had no jurisdiction to try it, as it was not a claim of the executor against the testator.

F. T. Lee, for executor.

W. Thompson, for contestants.

Coffin, S. The executor claims a balance of account of $2,000 against the deceased, growing out of dealings and transactions between the latter and the copartnership firm of Jones, Hall & Co. That firm was composed of Henry Jones (the executor), Thomas Hall and William Edgar. The other members of the firm are interested in this claim. It is, therefore, a claim of the firm, and not of the executor, and is contested by the legatees, Mrs. Martin and Mrs. Gage. Much of the evidence taken, relates to items of the account, resulting in the balance claimed.

Nothing is better settled than that this court can try and determine the disputed claim of an executor or administrator

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on his accounting, and that he cannot so try and determine the disputed claims of other creditors. In the case of *Shakespeare* v. *Markham*, 72 N. Y. 400, it was held, before the adoption of the eighteenth chapter of the Code, under 2 Revised Statutes, section 33, that "this section must necessarily refer to all claims in which an executor is interested, and the circumstance that he is jointly interested in a demand, or owns a portion of that in which he has an interest by assignment, does not affect the authority of the surrogate to adjudicate in regard to it." There, he did own a portion of the claim, and had paid the other joint owners their shares, previous to the accounting, and thus became subrogated to their rights, and was regarded as their assignee. Hence, it would seem that the *dictum*, "that where he is jointly interested in a demand" the surrogate has jurisdiction to adjudicate it, may justly be regarded as *obiter*. I have great respect for the learning of the able jurist who delivered the opinion in that case, and have grave doubts as to whether he considered this immaterial point with the accustomed acumen displayed by him upon any material matter. Indeed, it is plain that his attention was given solely to the facts of that case upon this point, for he says, "as he" (the executor) "was entitled to have his interest determined, it does not deprive him of that right *because he has procured a transfer of other rights.*" And again, in closing, upon this branch of the case, he says, "I am unable to discover any reason why the surrogate should not try and determine the question as to *the claim* of the appellant."

Let us see into what difficulties we might be led by following the *dictum* referred to. A surrogate can only decree the payment to an executor of what he may find due to him. Now, in this case, about $2,000 is claimed to be due from the deceased to three persons, composing the firm, one of them being the executor, and the others mere creditors. Shall the decree award the whole sum to the executor, to the exclusion of the other members of the firm, or shall he decree an equal division among the three? But, they may not be equally interested, and may differ among themselves as to their

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respective rights. Must this court then hear and adjudicate their respective interests, and so assume burdens that do not properly belong to it, and over which no statute gives it jurisdiction?

The Revised Statutes, *supra*, provide that "no part of the property of the deceased shall be retained by an executor or administrator in satisfaction of *his* debt or claim, until it shall have been proved to, and allowed by, the surrogate." The provision of the Code (§ 2739), leaving the above section unrepealed, is, that "upon a judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent.

Where a contest arises between the accounting party and any of the other parties, respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent *to the accounting party*, the contest must be tried and determined in the same manner as any other issue, arising in the Surrogate's Court." These provisions clearly contemplate a debt of which the executor or administrator is sole owner, or solely owes, and, if the former, when established, must be followed by a decree directing the payment or allowance thereof *to him*, and not to him and others. Had Hall and Edgar assigned their interest to the executor before these proceedings were commenced, then the case would have fallen within the principle decided in *Shakespeare* v. *Markham*, 72 N. Y. 400.

Surrogate ROLLINS, in the case of *Matter of Eisner*, 5 Dem. 383, recognized, without much apparent consideration, the validity of the *dictum* in the case above criticised, as applicable to every case where a claim of a firm, of which the executor is a member, is involved. To this I find myself unable to yield assent. It will not do to say there is no other mode provided by which such a claim may be determined. The doors of equitable jurisdiction of Superior Courts are wide enough to admit and then entertain and adjudicate such a claim. But the necessity of a resort to such a court may be

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readily obviated. The executor may pay the firm (he would not be likely to dispute its claim) and on filing a voucher therefor ask credit for the amount on the accounting. He will not thus violate the statute which forbids him to retain property of the estate in satisfaction of *his* debt, and on such accounting, any interested party may question the propriety of the act of payment. He may show, for instance, that the claim of the firm was barred by the Statute of Limitations, or that the amount paid was more than was actually due. The surrogate will not thus be trying what is known to the statute as a "disputed claim," which is one disputed by the executor, but simply testing his act in paying an alleged debt of the deceased, which is claimed not to be a proper charge against the estate.

The statute, as is well known, allows the executor to prove before the surrogate a debt *due to him*. This is not a debt due to him, and it is not an incident of such power which the surrogate may exercise, to allow the proving of a debt due to him *and others*. That would be to exercise a chief and not an incidental power.

The objection of the contestants is, therefore, sustained.

GOLD *v.* SERRELL.

(City Court of New York — General Term, February, 1896.)

Where from a referee's report it is evident what are the terms of the judgment to which a party is entitled, there is a compliance with section 1022 of the Code of Civil Procedure.

George W. Dease, for plaintiff (respondent).

Isaac N. Miller, for defendant (appellant).

FITZSIMONS, J. The defendant in July, 1890, owned 111 Hester street, this city. Her brother, John G. Lyons, was her general agent and whatever he agreed to do concerning said property bound her and she was willing to abide thereby.

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On July 31, 1891, she wrote him authorizing him to sell said premises for $19,500, provided he received compensation from the buyer for his services. The plaintiff, a real estate broker about the time above mentioned, had several interviews with defendant's said brother concerning the sale of said house which was offered for sale for $20,000 to him as a broker. He (plaintiff) found a buyer, ready, able and willing to purchase said premises for $19,900 cash, which offer was finally accepted by defendant's said brother, who signed the contract of sale for his sister, and finally the deed to said premises was executed and delivered by defendant through her said brother to the persons procured by plaintiff as purchasers. The defendants refused to pay the usual commission of one per cent, hence this suit for $199. Judgment was rendered by the referee in plaintiff's favor. The defendant's brother acted throughout all his dealings with plaintiff as her agent, and as he was her general agent, and as all things which he did concerning said premises was satisfactory to and approved by her, therefore his acceptance of the offer for $19,900 for the sale of said premises, which offer and final sale was procured and induced by and through the agency of plaintiff, the plaintiff earned his commission and was entitled thereto. Therefore, the judgment in his favor was rightful, and must be affirmed.

The appellant's objection that the referee's report fails to direct judgment as required by section 1022 of the Code of Civil Procedure, is without merit.

From the referee's report it is very evident what are the terms of the judgment to which the plaintiff herein is entitled to; that being so, the referee has complied with section 1022, and his report is sufficient. *Hinds* v. *Kellogg*, 37 N. Y. St. Repr. 356.

Judgment affirmed, with costs.

McGown, P. J., and Van Wyck, J., concur.

Judgment affirmed.

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Close *v.* Noye.

(Superior Court of Buffalo — Trial Term, February, 1893.)

Prior to the creation of a debt against a manufacturing corporation, and while defendant was a stockholder, the provision of law that stock issued for the purchase price of property necessary for the use of the corporation was exempt from liability for the debts of the company, was repealed. Defendant held such stock. *Held*, that at the time the indebtedness arose, defendant's stock was not exempt from its payment.

The legislature has power to impose a future liability upon a stockholder where before, by express provision of law, he was exempt from liability.

Action brought to charge a stockholder of a manufacturing company with liability for the debts of the company.

Simon Fleischmann, for plaintiff.

Adelbert Moot, for defendant.

Hatch, J. It is undisputed that a corporation known as the "American Bit and Brace Company" was legally organized; that defendant became a stockholder thereof March 1, 1888, when he received eight shares of the par value of $100 each, and between that date and March 8, 1889, he received eight shares more, making in all sixteen shares. This stock was issued to defendant by virtue of an agreement made with the company to receive the same in consideration of the use of a building and power necessary for the company in the prosecution of its business. The capital stock of the company was never paid in full, and no certificate was ever made and filed stating the amount of the capital stock, or that any part thereof had been paid in. The indebtedness, which is the subject-matter of this suit, arose out of a loan of $10,000, for which the company gave its notes. They not being paid at maturity were consolidated in one note, renewed, and thereafter plaintiff became the holder of the same before maturity, for value. The note not being paid when due, judgment was obtained against the company and execution issued thereon which was returned unsatisfied; thereupon this action was brought. It is insisted by defendant that he is relieved from

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liability, for the reason that the stock was issued to him for the purchase price of property necessary for the use of the company, that it is, therefore, exempt from liability for the debts of the company by virtue of the statute existing at the time when the stock was issued to him, that as the stock was thus exempt from liability for the debts of the company, he thereby became vested with a contract interest which could not thereafter be affected or impaired by act of the legislature or by any other method. Both positions of defendant are controverted. In the view I take of this case, it is essential to determine but one of these questions. It may be conceded, for present purposes, that the stock was issued to defendant in payment for property and that the statute of 1853 (3 R. S. [8th ed.] 1961) exempts such stockholder from liability created under the act of incorporation. It, however, still remains as the fact, that prior to the creation of the debt, and while defendant was a stockholder, this act was repealed. Laws of 1890, chap. 564. Consequently there was no exemption of this stock at the time when the indebtedness arose. We, therefore, come to the question, was it within the legislative power to change the law that liability might be created? By virtue of section 19 of the act authorizing the creation of the company (3 R. S. [8th ed.] 1958), the legislature reserved the right to alter, amend or repeal the same. By virtue of this reserved power, it has been held to be within the legislature's province to impose, by way of amendment, a future liability upon a stockholder, where before, by express provision of law, he was exempted from liability. *Matter of Lee's Bank of Buffalo*, 21 N. Y. 9.

This is the doctrine of the Court of Appeals, affirmed in the same case by the Supreme Court of the United States, under the name *Sherman* v. *Smith*, 1 Black, 587, and, so far as I am able to discover, remains the law at this day. I am quite aware that in some states, in some opinions, and in some text books, phrases, with perhaps sustained statements, may be found, in apparent conflict with this view. They do not, however, exist in this state, for here the statements and

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decisions have remained consistent and uniform, in support of such doctrine (*Mayor* v. *Twenty-third St. R. Co.*, 113 N. Y. 311; *Union Hotel Co.* v. *Hersee*, 79 id. 454), where the court say: "In such cases subscribers to the stock of corporations whose charters are liable to be so changed or altered must be regarded as consenting to the change." *Bailey* v. *Hollister*, 26 N. Y. 112; *Matter of Empire City Bank*, 18 id. 199; *McLaren* v. *Pennington*, 1 Paige, 102; *Poughkeepsie & Salt Point Plank Road Co.* v. *Griffin*, 24 N. Y. 150; *In re Reciprocity Bank*, 22 id. 9.

The principle underlying this determination has recently been the subject of decision by the Supreme Court of Rhode Island (*State* v. *B. & S. Manuf'g Co.*, 46 Alb. L. J. 504), where the doctrine herein contended for is supported.

These views lead to a judgment for plaintiff, with costs.

Judgment for plaintiff.

MANCHESTER *v.* VAN BRUNT.

(New York Common Pleas—General Term, February, 1896.)

In a proper case, a deposit in the post-office of a notice of dishonor, though accompanied with a direction to return if not delivered in ten days, is sufficient notice to charge an indorser.

APPEAL from a judgment of the General Term of the City Court of New York, which affirmed a judgment for plaintiffs, entered upon a verdict and affirmed also an order denying defendant's motion for a new trial.

Action by holders against indorser to recover upon a promissory note payable in the city of New York, where the indorser had his place of business and also resided. The defenses were that the indorser was discharged by reason of the omission to give him due notice of nonpayment of the note at maturity, and also by a subsequent agreement between the holders and maker whereby the time for payment was extended.

Sackett & Lang, for plaintiff (respondent).

Alfred B. Cruikshank for defendant (appellant).

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PRYOR, J. To an action by the holder of a note against the indorser, the defendant pleads a discharge for default in notice of dishonor. The note being payable and the indorser resident in the city of New York, the plaintiff availed himself of the method of notice provided by statute, namely, by deposit in the post-office; but, by indorsement on the envelope containing the protest, the postmaster was requested to return it to the plaintiff if not delivered within *ten days*, and the argument is that this direction defeated the effect of the deposit as a notice. We are of opinion that the contention is untenable.

The law never required actual notice to the indorser, but due diligence sufficed to charge him. *Gawtry* v. *Doane*, 51 N. Y. 84; *Libby* v. *Adams*, 32 Barb. 542. Proceeding on the presumption that a communication duly addressed and deposited in the post-office will regularly reach its destination (*Oregon Steamship Co.* v. *Otis*, 100 N. Y. 446; *Price* v. *McGoldrick*, 2 Abb. N. C. 69), the statute prescribes that a notice of protest "may be served" by being so addressed and deposited. Hence such deposit is the legal equivalent of notice. *Ellis* v. *Bank*, 40 Am. Dec. 63; *Montgomery* v. *Marsh*, 7 N. Y. 481.

Yet, notwithstanding the literal terms of the statute, it may be assumed that were the deposit so conditioned and incumbered as to repel the presumption of delivery, it would not amount to notice. But such is not the present case. From the facilities and securities for the prompt delivery of mail matter in the city of New York, the inference is inevitable that ten days was ample time for the receipt of the notice by the defendant.

By the United States Revised Statutes, it is provided that a letter not called for within a given period shall be sent to the "dead-letter" department, and by section 3939 that, after thirty days, if the name and address of the writer be indorsed on the letter, it shall be returned to him. The state statute making a deposit in the post-office equivalent to notice, must have contemplated these provisions of federal law, and hence

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the inference that an absolute and unrestricted deposit is not a necessary condition of such notice.

By the Code, under certain circumstances, service of pleadings may be made by mail; and the service is complete upon deposit in the post-office, although, in fact, the paper miscarry in the delivery. *Jacobs* v. *Hooker*, 1 Barb. 71; *Crittenden* v. *Adams*, 5 How. 310. In *Gafney* v. *Bigelow*, 2 Abb. N. C. 311, the defendant deposited his answer in the post-office, but with a direction to return it, "if not called for in five days." An objection that this qualification of the deposit destroyed its effect as a legal service, was overruled by a court consisting of MULLIN, P. J., E. DARWIN SMITH and GILBERT, JJ. The authority is in point, and would control our decision even were it supported by less satisfactory reasons.

Appellant assails the judgment again on the ground that the defendant was discharged by an extension of time to the maker; but it appearing beyond doubt that the indulgence was gratuitous, the liability of the indorser is unaffected. Upon this point, nothing need be added to the argument of the City Court, General Term.

So far as the appeal invites a consideration of questions of fact, they are concluded before us by the determination of the court below. In other exceptions, we observe no feature of gravity.

Judgment affirmed, with costs.

DALY, Ch. J., concurs.

BISCHOFF, J. (dissenting). No appeal lies to this court from an order of the City Court of New York, which refuses a new trial, and we are, therefore, authorized to review the judgment only upon due exception taken at the trial. Code Civ. Proc. § 3191; *Wilmore* v. *Flack*, 96 N. Y. 512; *Smith* v. *Pryor*, 16 Daly, 169.

At the close of the testimony for both parties, defendant's counsel asked that a verdict be directed for defendant, and the exception taken to the denial of this motion presents error for which the judgment must be reversed.

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In substance, the agreement of the indorser of a promissory note is that he will pay if the maker does not, provided that at maturity the note is duly presented for payment, and, if not paid, prompt notice of the fact given him. To charge him, it is incumbent upon the holder of the note, therefore, to show that the conditions upon which the indorser's liability rests have been duly performed. If they have not, the indorser is discharged without regard to the question whether or not he has been harmed by the omission. *Cayuga Co. Nat. Bank* v. *Warden*, 1 N. Y. 413.

Before the statute, which authorizes service of a notice of nonpayment of a promissory note by deposit in the post-office, was enacted, such service, *if the indorser resided in the same city or town where the note was, in terms, payable, or legally presented, or had his place of business therein*, could only be made by leaving the notice at the residence or place of business of the indorser. *Van Vechten* v. *Pruyn*, 13 N. Y. 549. Service by mail was ineffectual. *Ransom* v. *Mack*, 2 Hill, 587. By Laws of 1857, chapter 416, however, it is provided that "Whenever the residence or place of business of the indorser of a promissory note * * * shall be in the city or town * * * where such promissory note * * * is payable or legally presented for nonpayment * * * all notices of nonpayment may be served by depositing them, with the postage thereon prepaid, in the post-office of the city or town where such note * * * is payable or legally presented for payment, * * * directed to the indorser or drawer at such city or town." This was created a mode of technical or constructive service theretofore unknown, and in derogation of the indorser's common-law right to insist upon actual notice. Hence, the statute must be strictly construed. Sutherland on Statutory Construction, § 400; *McManus* v. *Gavin*, 77 N. Y. 36.

It is to be observed that the statute makes the fact of *deposit in the post-office* notice to the indorser. Whether, or not, the indorser *received* the notice by transmission through the mail is, therefore, immaterial, and the presumption of

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receipt from the fact of mailing, which is allowable in some cases (*Howard* v. *Daly*, 61 N. Y. 362; *Austin* v. *Holland*, 69 id. 571; *Oregon Steamship Co.* v. *Otis*, 100 id. 446; *Van Doren* v. *Liebman*, 11 N. Y. Supp. 769), is inapplicable to this. To say that the notice was deposited in the post-office, therefore received by the indorser, is *petitio principii*. Was it deposited in the post-office?

When defendant requested that a verdict should be directed for him it did not appear that any notice was attempted to be given him other than a notice which was inclosed in an envelope directed to defendant at his place of business and dropped in one of the street mail boxes, postage prepaid. But this envelope also bore plaintiff's address and a request from them to the postmaster to return the package if delivery thereof to the defendant was not effected within ten days; and by act of congress of June 8, 1872 (U. S. Rev. St. tit. 46, chap. 7, § 3939) compliance with this request is made obligatory upon the federal postal authorities. Thus the controlling question involved on defendant's motion was not whether, or not, defendant had presumptively, or in fact, received the notice by transmission through the mail, but, whether plaintiffs had performed the condition precedent to defendant's liability and given him due notice of nonpayment of the note at maturity. This, when the facts are not in dispute, or conflicting inferences cannot be drawn therefrom, presents a question of law which must be determined by the court. *Lambert* v. *Ghiselin*, 9 How. (U. S.) 552; *Harris* v. *Robinson*, 4 id. 336; *Bank of Columbia* v. *Lawrence*, 23 Wend. 620.

The motion assumed that the facts were as claimed for plaintiffs and logically we are brought to consider the question whether, or not, the mailing of the notice of nonpayment indorsed as stated constituted a deposit of it in the post-office within the meaning of chapter 416, Laws of 1857.

We are of the opinion it did not. Obviously the statute contemplated that the indorser would have the advantage of all means to be employed by the federal government in its

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efforts to effect delivery of mailed matter. This can be done by absolute and unqualified surrender of the notice to the custody of the postal authorities. In view, however, of the latter's duty to return it pursuant to the request therefor the deposit of the notice to defendant for transmission became cancelled upon expiration of the time limited for delivery. Limitation of the authority to deliver in respect to time rescinded the notice upon expiration of that time; and if authoritative custody for the purpose of delivery by the postal authorities can, as in the present case, be limited to ten days, there is no apparently sufficient reason why it may not be to less time, or why other restrictions affecting the delivery may not be imposed, and so eventual delivery of the notice be altogether frustrated. A limitation of ten days may not seem of moment in those cities wherein delivery by mail is effected by means of carriers at frequent intervals during the day, but the statute extends to all cities and towns alike, throughout the state, and delivery in many of the towns is accomplished only upon call at the post-office by the person to whom the mailed matter is addressed, or by some person on his behalf. Illness, absence from his usual abode or place of business, or the inclemency of the season may prevent this, and thus the expiration of the time limited for the purposes of delivery may prevent the notice from coming to the indorser's knowledge.

But, it may be urged, the legislature is presumed to have provided for service of the notice by deposit in the post-office with reference to the federal laws, and as these authorize a deposit for delivery within a limited time, such a deposit was contemplated by and is within the statute. To this the answer is that the statute which creates notice of nonpayment to the indorser by deposit of it in the post-office was enacted in 1857, while the obligation of the postal authorities to return it upon expiration of the time limited by the sender for delivery was not imposed until June 8, 1872. Hence the statute could not have contemplated a limitation of the time for delivery of matter deposited in the post-office; and it is rule in the inter-

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pretation of statutes that if one statute incorporates or adopts another, expressly or by implication, such incorporation or adoption extends only to the latter as it was at the time, and does not include subsequent alterations or amendments. Endlich on Interpretation of Statutes, § 85, p. 115; *Knapp* v. *City of Brooklyn*, 97 N. Y. 520; *Matter, etc., of Sing Sing*, 98 id. 454.

We attach no importance to the testimony of Manchester, a witness for plaintiffs, to the effect that the notice was never returned to them, because if the view entertained by us that the notice was not deposited in the post-office, as required by the statute referred to is correct, then, as matter of course, the omission to give defendant notice of nonpayment can in no sense be cured because a notice of which service was intended was not returned.

Our conclusion is that there was a failure of proof sufficient to constitute a cause of action and that defendant's motion for direction of a verdict should have been granted.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

Judgment affirmed.

McMahon *v.* Hodge et al.

(New York Common Pleas — General Term, February, 1893.)

The Mechanics' Lien Law (Chap. 342, Laws of 1885) being in derogation of the common law, its provisions must be strictly complied with. A lien not filed within ninety days after the completion of a contract or final performance of the work is, therefore, absolutely void.

Appeal by the defendant, James Hodge, from a judgment of a District Court of the city of New York, rendered in favor of the plaintiff.

Sherman Evarts, for defendant (appellant).

Samuel E. Duffey, for plaintiff (respondent).

Bookstaver, J. This action was brought in the District Court to foreclose a mechanic's lien, filed on the 10th day of

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October, 1891, for $100, by the plaintiff, a subcontractor, for a balance due under an oral contract made with the principal contractor, Schoonmaker, for the mason work, chimneys and plastering of a certain house to be erected by Schoonmaker for Hodge, the owner. The first question to be determined upon this appeal is whether or not the plaintiff acquired a valid mechanic's lien on the premises. There can be no doubt from the evidence that the work was finished, as far as the plaintiff ever finished it, in the spring of 1891. The plaintiff on his direct, testified that it was in June, and on his cross-examination testified that he thought it was in April or the spring. This would bring it not later than the first of July, while it is conceded the mechanic's lien was not filed until the 10th of October, 1891, more than ninety days after the completion of the work. Section 4 of the Mechanics' Lien Act, chapter 342, Laws of 1885, requires that the notice of lien must be filed in the county clerk's office within ninety days after the completion of the contract or the final performance of the work. If not filed within that time the claim is absolutely void. *Donaldson* v. *O'Connor*, 1 E. D. Smith, 695; *Lutz* v. *Ey*, 3 id. 621; *Hubbell* v. *Schreyer*, 14 Abb. (N. S.) 284; *Spencer* v. *Barnett*, 35 N. Y. 94. While the Mechanics' Lien Law makes benign provision for the payment of mechanics, material men and laborers, yet it is in derogation of the common law, and its provisions must be strictly complied with in order to be of avail to them. In this case the lien was not filed in time and, therefore, the complaint should have been dismissed. This question was not distinctly presented to the court below, and if it had been, the testimony upon the point might have been more clearly presented.

Having arrived at this conclusion, it is unnecessary to examine the other questions raised on the appeal.

The judgment should be reversed, and a new trial ordered, with costs to the appellant, to abide the event.

Bischoff, J., concurs.

Judgment reversed and new trial ordered.

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Wheeler & Wilson Manfg. Co. v. Jacobs.

(New York Common Pleas — General Term, February, 1893.)

Defendant, an infant, obtained of plaintiff, under a conditional bill of sale, a sewing machine, title to which was to remain in plaintiff until it was paid for in full, and in the event of defendant failing to pay the installments as agreed, plaintiffs were compelled to take back the property, and installments actually paid were to be regarded as money paid for the use thereof. In an action of replevin, the defense interposed was infancy and a counterclaim for the amount paid on the property. Judgment having been rendered for plaintiff, defendant appealed. *Held*, that the defense set up would be a valid one if the action had been founded upon contract; replevin, however, being a tortious action lies against an infant; that the bill of sale in question must be regarded as an executed contract as far as the payments actually made were concerned; and that defendant cannot recover thereon.

Whenever an infant pleads minority to escape payment of the purchase price, the seller may rescind the sale and replevin the goods.

While an infant must be served personally with the summons, yet before a valid judgment can be obtained against him, a guardian *ad litem* must be appointed.

Appeal from a judgment of a District Court of the city of New York, in favor of plaintiff. The opinion states the case.

Leopold Leo, for defendant (appellant).

John Holden, for plaintiff (respondent).

Bookstaver, J. This is a replevin action, brought to recover the possession of one of plaintiff's sewing machines which defendant obtained on a contract or conditional bill of sale in the usual form, by the terms of which the title to the machine remained in the plaintiffs until it was paid for in full, and in event of the defendant not paying the installments agreed upon and the plaintiffs were compelled to take back the property, the installments actually paid were to be regarded as money paid for the use of the machine. The defense interposed was infancy and a counterclaim for the amount paid on the property. There was no dispute but that default had been made in the payment of the installments. But it was contended that the action was prematurely brought

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because the plaintiff was an infant and no action could be maintained against her. This would be true if the action were founded upon a contract, but replevin never is. The basis of this action is a tort, and it is stated in the affidavit for the immediate claim and delivery of the property, that the defendant wrongfully detained the same. This is abundantly supported by the evidence in the case, for it appears that when the marshal, at the plaintiffs' request, sought to obtain possession of the machine under the claim and delivery papers, the defendant and her mother not only refused to give up the machine, but endeavored to secrete the same and claimed that it had been sold. This, if true, would have been a conversion of the property and a wrong against the plaintiff. Infants are liable for their torts and may even be indicted for the same. "If one is old and cunning enough," says Lord Chancellor COWPER, "to contrive and carry out a fraud, he ought to make satisfaction for it." 2 Eq. Ca. Ab. 515; *Badger* v. *Phinney*, 15 Mass. 59; *Homer* v. *Thwing*, 3 Pick. 492; *Cary* v. *Hotailing*, 1 Hill, 311; *Olmstead* v. *Hotailing*, Id. 317; *People* v. *Kendall*, 25 Wend. 399; *Wallace* v. *Morse*, 5 Ill. 392; *Rice* v. *Boyer*, 58 Am. Rep. 53; *Schunemann* v. *Paradise*, 46 How. Pr. 426; *Eckstein* v. *Frank*, 1 Daly, 334; Cooley on Torts, 120. Where the infant pleads his minority to escape payment of the purchase price, the seller may rescind the sale and replevin the goods. *Badger* v. *Phinney*, *supra*.

Although an infant must be personally served with the summons, yet before a valid judgment can be obtained against her a *guardian ad litem* must be appointed; that was regularly done in this case.

Appellant's counsel contends that even if the action can be maintained, she ought to have been allowed the amount she paid upon the contract of purchase. But this we think is not sound, as it was expressly agreed it should be regarded in case of default, as the value of the use of the property during the time she had it; and we cannot say that that was at all unreasonable, because it is manifest that the use of the machine

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must have greatly deteriorated its value. Besides the conditioned bill of sale must be regarded as an executed contract as far as the payments actually made were concerned, and infants cannot recover on such contracts. *Crummey* v. *Mills*, 40 Hun, 370. The case of *Green* v. *Green*, 69 N. Y. 556, was peculiar, and the court expressly states that it was to apply only to the facts in that case. Infants cannot return property without paying actual damage to it; the vendor must be put *in statu quo*. *Bartholomew* v. *Finnemore*, 17 Barb. 428; *Gray* v. *Lessington*, 2 Bosw. 257. In this case, however, the defendant did not attempt to return it, but on the other hand sought to prevent the plaintiffs from obtaining possession of it.

The judgment should be affirmed with costs.

Bischoff, J., concurs.

Judgment affirmed.

Mooney *v.* Trow Directory, Printing and Bookbinding Co.

(New York Common Pleas — General Term, February, 1898.)

The rule with regard to keeping to the right on a public highway, does not apply when there are obstructions on that side of the road. *Quære*, as to whether it applies to any one except drivers of vehicles of some kind.

Appeal from a judgment in favor of plaintiff rendered in a District Court of the city of New York. The action was for damages caused to a horse owned by plaintiff, by a collision between the horse and a delivery wagon belonging to defendant, at the time in charge of one of its servants.

Frederick R. Kellogg for defendant (appellant).

Benjamin Yates for plaintiff (respondent).

Bookstaver, J. This action was brought to recover damages for an injury to one of plaintiff's horses occasioned by the negligence of defendant's servant. The learned and careful judge who tried this case in the court below, has correctly stated the law both as to the right of way upon a public

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highway, and concerning plaintiff's contributory negligence. But appellant's counsel criticises the opinion delivered by the justice in that he merely stated: "It appears to me that he has sufficiently explained his presence on the left-hand side of the street going westward;" without going into the details for such a conclusion. We think in this respect he is to be commended rather than condemned, because reasons for arriving at a conclusion of fact, especially when they are drawn from surrounding circumstances, can serve no good purpose and are seldom satisfactory to the party against whom the decision is made. But an examination of this case shows that he was fully justified in arriving at the conclusion he did. It is in evidence that the accident happened about a quarter past six in the evening of the 29th of January, 1892; the horse was being led by one of plaintiff's employees up Twenty-third street to his stable; there were two lines of street railroads on that street, each railroad owning and operating two tracks, thus making four tracks in all; at that time of the day the street was very much crowded with trucks, and plaintiff's employee testified that when leaving the coal yard he led the horse upon the track nearest the south side of Twenty-third street going west, because both sides of the street north and south were crowded with trucks, and right behind him on this track was a car going west, and that when he got near, that is within thirty or forty feet of the corner of Avenue A and Twenty-third street, the driver of the car behind him called to him to turn out, and that in obedience to the driver's request he turned out, and before doing so he looked to see if anything was coming up, and he saw that it was clear ahead to the left, and that he could not turn out to the right, that is toward the north of Twenty-third street, because there were cars going easterly and also that the street north of the railroad track was crowded with trucks and that, therefore, he turned out towards the south.

It is extremely doubtful whether the law in regard to keeping to the right on a public highway applies to any one except the drivers of vehicles of some kind, and even as to them there

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are many exceptions. *Newman* v. *Ernst*, 31 N. Y. St. Repr. 1; *Harpell* v. *Curtis*, 1 E. D. Smith, 78; *Pike* v. *Bosworth*, 7 N. Y. St. Repr. 665; *Smith* v. *Dygert*, 12 Barb. 613; *Steele* v. *Burkhardt*, 104 Mass. 59; *Smith* v. *Gardiner*, 77 id. 418; *Spofford* v. *Harlow*, 85 id. 175. Thus it would be sufficient for one to show he was drawing up to his stopping place, to water his horse, or to turn out of the road, and, as we think in this case, because the right side of the road was obstructed by cars and trucks and other vehicles. On an examination of the evidence in this case, we think the justice was fully justified in finding as he did on this branch of the case.

Appellant also contends that there was no sufficient evidence that the defendant was guilty of negligence. But it appears from the case that the defendant's wagon at the time of the collision had three persons in it who were desirous of reaching the foot of Twenty-third street in time to catch the 6.18 ferry for Brooklyn and had but a very short time to do it in. It was testified to by a car driver, apparently disinterested and unbiased, that the cart at the time, was going at a very rapid rate and turning a corner, the wagon was not stopped, although defendant's own witnesses testify that everything was done to do so as soon as possible, in some distance, showing it must have been going at a very rapid rate of speed. And the justice was fully justified also in inferring the rapid rate at which the vehicle was going, from the nature of the injury inflicted upon the horse, which was very extensive and severe.

It was not claimed on this appeal that the rule of damages adopted by the justice was erroneous.

The judgment must, therefore, be affirmed, with costs

Bischoff, J., concurs.

Judgment affirmed.

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Meeks *v.* Simon.

(New York Common Pleas—General Term, February, 1893.)

In an action for damages for conversion based upon larceny, where defendant is shown to have acted in good faith, the measure of damages is the market value of the property in question. If, however, plaintiff has received to his use any money on account of the value thereof, defendant has the right to offset the same in mitigation of damages.*

Appeal from two judgments, each rendered in favor of plaintiff in a District Court of the city of New York. The opinion states the case.

George Carlton Comstock, for defendant (appellant).

Samuel Johnson, for plaintiff (respondent).

Bookstaver, J. These actions were brought in the Tenth District Court to recover from the defendant damages for the wrongful conversion of personal property, consisting of three watches, two of them of the alleged value of forty dollars each, and the third of the alleged value of seventy dollars. On the trial it was stipulated that the decision in one cause should control in the second action, and the parties proceeded to try the two actions together.

It appeared from the evidence that the plaintiffs were in the business of selling watches, diamonds and jewelry, and in the autumn of 1891 were the owners of the property in question. On or about October twenty-fourth, a Mrs. Hawkes called upon plaintiffs and told them that she had a party by the name of Mrs. Primm who wanted a watch; thereupon they gave her one of the watches in question to be delivered to Mrs. Primm, at the same time instructing Mrs. Hawkes to have Mrs. Primm sign a certain conditional bill of sale, which was given her in blank; when signed, this conditional bill of sale was to be returned by Mrs. Hawkes. When she received the watch, instead of taking it to Mrs. Primm, she took it to the defendant's pawnshop, where she pawned it for fifteen

* See *Higgins* v. *Whiting*, 24 Wend. 379.

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dollars, receiving a pawn ticket of the defendant, No. 74,313. The next day, or the day after, Mrs. Hawkes reported to the plaintiffs that she had delivered the watch in question to Mrs. Primm, and gave them the printed conditional bill of sale, with the blanks filled in and a signature at the bottom purporting in words to be that of Mrs. Primm, which is as follows:

"No. 660. This indenture witnesseth that I have this day rented and leased from W. F. Meeks & Co., of 9 Murray street, in the city of New York, the following goods and articles: Gold watch 479046, for the use of which I promise to pay the sum of $4 on the day hereof, and $1 each and every week until the sum of $40 has been fully paid, when said W. F. Meeks & Co. agree to execute and deliver to me a bill of sale of said goods without further consideration; and I agree to keep in my possession the said property in trust for the said W. F. Meeks & Co., who neither parts with, nor do I acquire any title thereto, until said sum shall be fully paid as aforesaid; and in case default shall be made in any of the aforesaid payments on a demand being made by the said W. F. Meeks & Co., I hereby agree to surrender and return to him the said goods, and allow him to keep and retain the money paid thereon for the use and rental thereof. In witness whereof, I have this 24th day of October, 1892, set my hand and seal. Signature, PRIMM.

"Residence 450 Canal street. [Seal.]"

On the back of the lease was indorsed the following:

"No. 6607; address,———; name, Primm; remarks, watch $40; October 24, $4; $12; $2."

When Mrs. Hawkes delivered this lease, she paid to the plaintiff five dollars, which was indorsed in one of the blank spaces on the back of the conditional bill of sale. From time to time thereafter, she brought in further moneys, and paid them to the plaintiffs on account of the watch referred to in this paper, telling them the money so paid was paid by Mrs. Primm on account of the conditions of the contract, and each

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time plaintiffs credited the sum on the back of the paper against the value of the watch therein mentioned. The plaintiffs afterwards discovered that the money was not paid by Mrs. Primm, but was Mrs. Hawkes' own money. In this manner they received altogether on account of this watch, the sum of eighteen dollars, against its value.

It thus appears by plaintiffs' evidence, which is undisputed, that on the watch No. 479,046, the plaintiffs received altogether eighteen dollars, which was not at any time tendered back to any one by the plaintiffs. There is no charge in these actions of any bad faith or knowledge of the fraud upon the part of the defendant, and he is merely sued as a purchaser or pledgee of the watch, for value. In addition to this, it appeared that the cost of this watch to the plaintiffs was eighteen dollars only, exactly the sum which had been paid them for the watch by Mrs. Hawkes.

Precisely the same facts appear as to the second watch, No. 442,804, except that Mrs. Hawkes got it, alleging that it was for an Alice Primm, on the 25th of November, 1891, and pawned it with the defendant on the same day. The third watch was obtained under precisely the same state of facts, except that Mrs. Hawkes got it on November 6, 1891, stating it was for a Mrs. Hughes, and pawned it with the defendant on the same day. The value of this watch, as alleged in the conditional bill of sale, is seventy dollars; it cost the plaintiffs thirty-two dollars and thirty cents, and it could have been replaced by them for the same money.

It further appears that when the demand for these watches was made upon the defendant, the plaintiffs did not tender to him either the pawn tickets, or the amount defendant had advanced on the watches, or any part thereof.

If the plaintiffs have the right to maintain these actions at all, it must be upon the theory of a conversion, based upon a larceny of the watches by Mrs. Hawkes, and as against the defendant acting in good faith, they could only obtain their actual damages, that is, the market value of the watches, or what it would have cost the plaintiffs to have replaced them.

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Wehle v. *Haviland*, 69 N. Y. 448. There does not seem to be a case precisely parallel to those under consideration. Yet there are a number of cases in this state based upon the principles involved in these actions. Thus it has been held that after the conversion of the property, the title still remained in the owner, and the property can be taken from the wrongdoer upon an execution against the owner, and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property. In such case, the wrongdoer can set up this seizure and sale, not as an entire defense, but in mitigation of damages. *Ball* v. *Liney*, 48 N. Y. 14. Where the owner voluntarily receives the proceeds of the property wrongfully taken, or directs or assents to their application to his use, such facts may be shown in mitigation the same as the receipt or application of the identical property taken by the trespasser. *Torry* v. *Black*, 58 N. Y. 185. Hence, in these actions, the defendant had a right to offset, in mitigation of the damages of plaintiffs, the sum of money received on account of these watches by them. Thus, from the value of the first watch, to wit, eighteen dollars, should be deducted eighteen dollars; from the value of the second watch, which was eighteen dollars, should be deducted eleven dollars, the amount paid thereon; and from the value of the third watch, thirty-two dollars and thirty cents, should be deducted twenty-three dollars and thirty cents. And the justice who tried this case erred in giving judgment for the full amount, without making those deductions.

The judgment should, therefore, be reversed, and a new trial ordered in the court below, with costs to the appellant to abide the event, unless plaintiffs will consent to a reduction of the judgments, as before indicated.

Bischoff, J., concurs.

Judgment accordingly.

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Morgenthau v. Walker.

(New York Common Pleas — General Term, February, 1893.)

The testimony of a witness who is found to have intentionally sworn falsely on a material issue in the action, is of no legal force or effect as to another matter in respect of which he is contradicted and is not sustained by corroborative evidence; and a judgment resting on such testimony alone, will be reversed as without evidence.

Appeal from judgment and order of the General Term of the City Court affirming judgment on dismissal of the complaint by the referee. The opinion states the case.

Samson Lachman, for plaintiffs (appellants).

Alexander Thain, for defendant (respondent).

Pryor, J. As brokers, the plaintiffs sue to recover an agreed commission for the sale of defendant's property. The negotiation with the plaintiffs was conducted by the defendant's husband; and the learned referee finds that he was duly authorized to sell the property and to employ plaintiffs for that purpose; that, in fact, he did employ them, and did promise to compensate them for the service. But, the referee finds also, that the purchaser produced by the plaintiffs refused to accept defendant's offer; and that, as a legal consequence, they were not entitled to judgment. Accordingly the complaint was dismissed on the merits.

Hence, the only question before this tribunal is, whether the record exhibits any evidence to support the referee's finding; for, if there be such evidence, however unsatisfactory to us, we have no jurisdiction, as a court for the review of errors in law only, to disturb the judgment below.

Upon an attentive examination of the evidence, we are clearly of opinion that it was sufficient, if believed, to justify the finding that the terms of the defendant's offer of sale were never accepted by the intending purchaser. Undoubtedly the plaintiffs produced cogent evidence of such acceptance; but, then, the witness Walker gave testimony to the contrary; and

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if he is to be credited, there was a conflict of evidence upon which the decision of the trial court is obligatory on us.

But, appellants contend that the testimony of Walker was of no legal force or effect, and for these reasons: that he was the husband of the defendant, and so a hostile witness whom they called from necessity; that his testimony was prevaricating and inconsistent with conceded facts; that it was contradicted by adverse evidence of cumulative and impressive character; and especially that, by the findings of the referee on other material issues, he was convicted of intentional false swearing. Nevertheless, however, if his evidence was of any legal value, the credibility of the witness and the truth of his testimony were still problems for solution by the trial court only, and after affirmance of its decision by the General Term, we are powerless to discredit the evidence.

Upon the application and effect of the maxim *falsus in uno falsus in omnibus*, the adjudications by the courts of this state are in irreconcilable conflict. *Dunlop* v. *Patterson*, 5 Cowen, 243; *Dunn* v. *People*, 29 N. Y. 523; *Lee* v. *Chadsey*, 3 Keyes, 225; *People* v. *Evans*, 40 N. Y. 1; *Pease* v. *Smith*, 61 id. 477; *Place* v. *Minster*, 65 id. 89; *Wilkins* v. *Earle*, 44 id. 172; *Butler* v. *Truslow*, 55 Barb. 293; *Brett* v. *Catlin*, 47 id. 405; *Warren* v. *Haight*, 62 id. 490. In a subsequent case (*Deering* v. *Metcalf*, 74 N. Y. 501), an attempt was made to evolve from these discrepant rulings a consistent principle of decision, namely: "The fact that the testimony of a witness is shown to be untrue in some particular does not, as matter of law, where it is not made plain that the testimony was corruptly given, require his testimony, as to other matters, *in which it is not contradicted*, to be disregarded. A court of review, therefore, cannot, as matter of law, hold that a finding based solely upon such *uncontradicted* testimony is without evidence to sustain it." The court then *queries* whether the rule would be different when it conclusively appeared that the witness was corruptly false in testimony which was contradicted. The precise point adjudged in the case was, that where a witness (defend-

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ant in the action) who had sworn to *two* items in an account, was believed by the referee as to *one* item and disbelieved as to the other in respect of which he was contradicted, it was not error in law to find the one item on his unsupported testimony. It will be observed, however, that the court conditions the credibility of the witness as to the fact found, upon the postulate that, as to that fact, his testimony was uncontradicted, whereas here the testimony of the witness as to the fact found, was overborne by persuasive evidence to the contrary.

And not that alone. His testimony to the fact that the defendant's offer was not accepted, that an agreement to sell was not concluded, was inconsistent with the conceded facts that he permitted a formal contract to be drawn up in his presence, that he took it to the defendant for execution, and that he delivered the abstract of title to the plaintiffs with instructions to make the search and prepare the deed. Nor is this all. His testimony to the point is in conflict with an implied admission of the defendant, who, after the contract was shown her, rejected it by this note to plaintiffs: "I have decided not to sell the property. If you have incurred any expense, kindly send me the bill." Here is no repudiation of the terms of the contract; no rejection of the proposed purchase because not in accordance with her offer, but only because she had "decided not to sell the property." *Expressio unius exclusio alterius.* Placing her refusal to execute the contract solely upon the ground that she had concluded not to part with the property, negatives the inference that the terms were not in conformity with her offer.

But still more destructive of the testimony in question, is the finding of the referee upon other matters. In discredit of evidence by the witness directly to the contrary, the referee finds that he had authority to sell the property and to employ plaintiffs for the purpose; that he did employ the plaintiffs and did agree to pay them the commission. Now, these were facts of which the witness, in the nature of things, must have been personally cognizant; so that, by necessary

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implication, the referee found him guilty of intentional false swearing.

It results, therefore, that the case is not within the rule enunciated by the Court of Appeals in *Deering* v. *Metcalf*, 74 N. Y. 501. Nay more, the court expressly leave open the question, whether the corrupt false swearing alone as to some matter would not, in law, totally invalidate the evidence of the witness, but here we have the added circumstances of discredit just recited. It is impossible to resist the conclusion that, upon the facts of the present case the Court of Appeals would reject the testimony of the witness as of no legal value or efficacy.

It may be answered, however, that, upon the language of the court in its opinion, it was for the referee to determine whether the witness had intentionally sworn falsely, to which the obvious reply is, that the referee must have so found, for to disbelieve a witness as to a fact of which he necessarily has personal knowledge and makes positive oath, is, beyond escape, to convict him of corrupt false swearing. But even though we construe the findings of the referee as not convicting the witness of corrupt false swearing, still the Court of Appeals plainly intimate that, if in their judgment such was the fact, they would not affirm a judgment resting upon his uncorroborated testimony.

From the most careful scrutiny of the evidence, it is our conviction that the judgment stands only on the contradicted and uncorroborated testimony of a witness conclusively shown to have intentionally sworn falsely as to material facts in the case.

Judgment reversed and a new trial ordered, costs to abide the event.

Bookstaver and Bischoff, JJ., concur.

Judgment reversed and new trial ordered.

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HALLEN *v.* JONES.

(New York Common Pleas — General Term, February, 1893.)

An order entered upon the consent of the parties, vacating an order of arrest, is not, without more, such a final decision against the right to the order of arrest as will support an action on the undertaking.

APPEAL from judgment of the General Term of the City Court affirming judgment on a verdict by direction of the court. The opinion states the case.

J. E. Berry, for defendants (appellants).

James D. Hallen, for plaintiff (respondent).

PRYOR, J. In an action by defendant Jones against the respondent, an order of arrest issued, but was vacated by consent. Thereupon this action was brought against Jones and the sureties in his undertaking on the arrest; and from the judgment against them, they prosecute the present appeal.

At the close of the case, the defendants moved to dismiss the complaint, because of a defect of parties and insufficiency of proof; and to the denial of the motion, they duly entered an exception. They are entitled, therefore, to the presumption that the case contains all the evidence. *Meislahn* v. *Englehard*, 1 Misc. Rep. 412.

If there be a defect of parties, it is apparent on the face of the complaint, and was waived by the failure to demur. *Zabriskie* v. *Smith*, 13 N. Y. 322; *Maxwell* v. *Pratt*, 24 Hun, 448.

In their zeal on the one side to establish, and on the other to invalidate, the proposition that the vacatur was a definitive determination against the order of arrest, the learned counsel overlook a point decisive of the appeal, namely, that the order was vacated by consent.

To the maintenance of the action, it was incumbent upon the respondent to show a final decision against the right to the order of arrest. Code, § 559. The original action not having gone to judgment, he relied on the vacatur as involving such

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decision. But, the order vacating the order of arrest was entered by consent, and so it was not a judicial determination that the plaintiff in the original action "was not entitled to the order of arrest." In *Apollinaris Co.* v. *Venable*, 48 N. Y. St. Repr. 848, the Court of Appeals say, that "where the plaintiff *ex parte* and without the consent of the defendant, enters an order vacating the injunction and discontinuing the action, this is equivalent to an adjudication that the plaintiff was not entitled to the injunction;" but, conversely, "if the dissolution of the injunction and dismissal of the action proceed upon matter arising subsequent to the commencement of the action and having no relation to the merits." In the case before us, neither was the action discontinued nor the vacatur *ex parte*, but the order was entered by common consent and the action left depending. The order recites no other ground for vacating the arrest than "the consent of the plaintiff's attorneys," and so, in the absence of explanation, demonstrates that it involved no judicial determination of the right to the order of arrest. Of a discontinuance by agreement between the parties, the Court of Appeals said: "The action was never finally determined by judicial decision. * * * There was no judicial determination upon the merits of the action, or the rights of the plaintiff to the injunction order at the time when it was made." And, adverting to cases cited *contra*, the court distinguishes them by the essential difference that, "in none of them was the discontinuance a matter of agreement between the parties to the action." *Palmer* v. *Foley*, 71 N. Y. 106, 111; *Johnson* v. *Elwood*, 82 id. 362, 365.

It appears by the papers upon which the plaintiff in the original action proposed to move to vacate the order of arrest, that it had been granted irregularly and in contempt of court. Thus, the consent to vacate may be an admission by the appellants, and the order of vacatur a decision by the court that they were never entitled to the order of arrest; and if so, possibly the present action is well brought. *Palmer* v. *Foley*, 71 N. Y. 106. And yet the appellants offered the papers in evidence and they were excluded on objection from the respondent.

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Judgment reversed and new trial ordered, costs to abide event.

Bookstaver and Bischoff, JJ., concur.

Judgment reversed and new trial ordered.

COCHRAN COTTON SEED OIL CO. *v.* HAEBLER.

(New York Common Pleas — General Term, February, 1893.)

Upon a purchase of property abroad to be delivered in the city of New York, the carrier is the seller's agent to make such delivery; but on the arrival of the goods at the carrier's depot in the city, the carrier becomes the agent of the buyer to make actual delivery.

APPEAL from judgment of the General Term of the City Court, affirming judgment on a verdict directed by the court.

Action by vendor to recover the purchase price of fifty barrels of cotton seed oil, manufactured in South Carolina, and sold "for October delivery in New York city."

Defense, no due delivery.

Marshall P. Stafford, for defendants (appellants).

Robert B. Honeyman, for plaintiff (respondent).

PRYOR, J. We are of the opinion that the case was well decided by the court below.

The propositions are indisputable that because of the plaintiff vendor's engagement to deliver the oil in New York city, the property did not pass until delivery, and that the carrier was the plaintiff's agent to make the delivery. 2 Corbin's Benjamin Sales, § 1040; *Magruder* v. *Gage*, 33 Md. 344; 3 Am. Rep. 179; *Hobart* v. *Littlefield*, 13 R. I. 342; *McNeal* v. *Braun*, 53 N. J. Law, 617. But, upon the arrival of the oil in the city of New York, at the pier where the defendants knew the railroad company would discharge its freight, there was a delivery of the oil in conformity with the terms of the contract, and from that time forth the company became the

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agent of the defendants, and the plaintiff was absolved from all responsibility for its conduct. *Pacific Iron Works* v. *Long Island Railroad Company*, 62 N. Y. 272. True, as contends the learned counsel for the appellants, in particulars the case varies from the one at bar; still, for the propositions in support of which it is cited, it is an explicit and decisive authority.

The oil arrived at the pier in the city of New York between four and five o'clock P. M. of the thirty-first of October, and as the plaintiff had to the last hour of the day within which to deliver, the delivery was seasonably made pursuant to the contract.

Our conclusion is that, as matter of law, the plaintiff performed its agreement by due delivery; but if a question of fact on the evidence, the parties consented by motions for a verdict, that the judge should determine it, and we are not at liberty to review his decision.

Judgment affirmed, with costs.

BOOKSTAVER and BISCHOFF, JJ., concur.

Judgment affirmed.

HAAS *v.* ALTIERI.

(New York Common Pleas — General Term, February, 1888.)

Where the drawer of a check delivers it to a third party upon his promise to deliver it to the person for whom it was intended, such party becomes a bailee for such person; and in replevin by such person for the check, such party is estopped to assert a right in himself to the check.

In replevin in the *detinet* a general denial puts in issue the plaintiff's title to the property and his right of possession.

APPEAL from judgment of the General Term of the City Court affirming judgment on a verdict. The opinion gives the case.

Franklin Pierce for defendant (appellant).

Hays & Greenbaum for plaintiff (respondent).

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PRYOR, J. The action being replevin in the *detinet*, the general denial puts in issue as well the title of the plaintiff as the wrongful detention by the defendant. *Griffin* v. *Long Island R. Co.*, 101 N. Y. 348.

It is not to be doubted that replevin lies for the possession of a check. *Bank* v. *Bingham*, 118 N. Y. 349; *Barnett* v. *Selling*, 70 id. 492. It must be so, upon principle; since replevin may be brought for any personal chattel susceptible of description and seizure; and that a check is property is a self-evident proposition — equally with a note, or draft, or bill of lading. *Nichols* v. *Mase*, 94 N. Y. 160, held only that a lease in *custodia legis* is not the subject of replevin; and *Barnett* v. *Selling*, 70 N. Y. 492, that neither is a check "paid and returned as a voucher to the maker." It is inconceivable that value may be predicable of a check so irrecoverably extinct.

The real question in controversy is, whether the plaintiff had such title to the check as would sustain the action.

It is elementary that to support replevin, the plaintiff must have such an interest in the chattel as gives him the right of immediate possession. And the title must be a legal title, not a right enforceable only in equity. *Pettibone* v. *Drakeford*, 37 Hun, 628; *Fulton* v. *Fulton*, 48 Barb. 581; *Deely* v. *Dwight*, 32 N. Y. 59. What was plaintiff's title to the check?

A thousand dollars was payable to plaintiff by Lovell. For this sum Lovell drew the check in controversy, to the order of defendant's firm, and by them indorsed to plaintiff; and gave it to defendant for delivery to plaintiff. Instead of so delivering it, defendant erased the indorsement to plaintiff, and deposited it in his own bank. Meanwhile, however, discovering that defendant would not deliver the check to plaintiff, Lovell countermanded its payment. Upon this state of facts, why did not the legal title to the check vest in the plaintiff? Lovell, the drawer, had passed it to defendant for delivery to the plaintiff, and the defendant, by his indorsement to plaintiff, had transferred to him the property with the right of possession. Thus Lovell had parted with the possession and dominion of the check, with the intent to transfer

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both to the plaintiff. Why was not this concurrence of act and intent sufficient and operative to vest title in the plaintiff? The answer is, first, that a delivery to plaintiff was indispensable to the transfer of title; and, secondly, that the erasure of the indorsement to plaintiff defeated that effect. But, the delivery was to defendant as a mere intermediary between Lovell and plaintiff, and so, in legal effect, the delivery to defendant was a delivery to plaintiff. Nor could the defendant, by a mere wrongful erasure of the indorsement, intercept the passage of the title to plaintiff, any more than by the destruction of the check he could accomplish that result. Such destruction, of itself, would have constituted a conversion.

But wherever, in fact, the title may have resided, the defendant was precluded from saying that it was not in the plaintiff.

The facts, as found by the jury under the charge, were: That Lovell gave the check to the defendant as the property of the plaintiff and for delivery to the plaintiff; that the defendant accepted possession of the check as the property of the plaintiff, and upon an express promise to deliver it to him. By what right could the defendant deny the title of the plaintiff and assert an adverse interest in himself? Upon every principle of estoppel he was precluded from assuming any such position. He took upon himself the character of bailee for the plaintiff, as such was bound to deliver the check to the plaintiff, and by all authorities and the plainest principles he will not be heard to say, as against the plaintiff, that the check is his property, nor that he has any interest in it in hostility to the plaintiff's title and right of possession.

For the purposes of the action, then, the title of the plaintiff was irrefragable.

But it is urged that the stoppage of payment of the check made it valueless. Not so, however, since the stoppage was not against the plaintiff; and, at all events, he still had a right of recourse against the drawer.

As a ground of dismissal, it was insisted that the return *pendente lite* of the check to Lovell sufficed to defeat the

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action; but in truth this was a substantive and independent wrong on the part of the defendant, and of itself subjected him to liability. It is fundamental that a right of action once vested can be extinguished only by release or satisfaction.

It is further contended that Lovell was the proper person to use, but as owner of the check the plaintiff was the real party in interest.

As to the point that the jury applied an erroneous rule of damages in allowing plaintiff the face value of the check, we answer that this is the *prima facie* measure of compensation (*Booth* v. *Powers*, 56 N. Y. 22; *Western R. Co.* v. *Bayne*, 75 id. 1), and that defendant failed to reduce the apparent amount of recovery.

An examination of appellant's exceptions to the charge and the evidence, satisfies us that they are not of merit.

Judgment affirmed, with costs.

Daly, Ch. J., and Bischoff, J., concur.

Judgment affirmed.

Naylor *v.* McSwegan.

(New York Common Pleas — General Term, February, 1893.)

It is not necessary to a warranty of chattels that there should be an express agreement of warranty.

A positive affirmation of quality or condition, as a fact and not an opinion, accepted and relied upon by the vendee as a warranty, suffices to constitute a warranty.

Appeal from judgment on verdict and from order denying new trial. The opinion states the case.

George W. McAdam, for plaintiff (appellant).

John S. Davenport, for defendant (respondent).

Pryor, J. The action is upon a warranty in the sale of an elevator engine. In his charge the learned trial judge assumed the fact of the warranty and its terms as expressed in the instrument of sale; and he submitted to the jury the issues of

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a breach and consequent damages. He did more. On the suggestion of plaintiff that the scope of the written warranty was subsequently enlarged by parol, he left to the jury the question of a modification of the original agreement, and, if any, whether it was broken and what the damages. Upon sufficient evidence the jury found all the issues in favor of the defendant; and we are concluded by the verdict as to the facts in litigation.

The question is whether the record exhibits error available for reversal of the judgment.

The appellant asserts an oral warranty prior to the written agreement; and he complains that the court excluded it from consideration by the jury. But, manifestly, the written proposal tendered by the defendant and accepted by the plaintiff, contains the terms of a consummate contract, and so merges all previous parley between the parties. *Chapin* v. *Dobson*, 78 N. Y. 74, decides only that the rule forbidding parol evidence does not apply "where the original contract was verbal and entire and a part only was reduced to writing, nor to a collateral undertaking." Here the instrument constitutes the contract of sale, and it embodies the reciprocal stipulations of the parties, including the warranty. In *Briggs* v. *Hilton*, 99 N. Y. 517, the paper was a mere memorandum, and not the contract itself. Our adjudication in *Lamson Consolidated Co.* v. *Hartung*, 46 N. Y. St. Repr. 191, is conclusive of the question in controversy.

In relation to the alleged oral warranty subsequent to the written contract, the judge charged that "if it were loose talk, mere representation without an agreement, it amounts to nothing and is not a guaranty; * * * In order to make this a proper guaranty, it was not necessary to have any express form of words, but it was necessary for the plaintiff to prove to your satisfaction that the defendant intended by what he said that this machine was to work as well as the other; * * * It is incumbent upon the plaintiff to show to your satisfaction that a warranty was agreed to between the parties, and not loose words; * * * If it did not in your

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judgment amount to an agreement, mere representation of what a thing will do is nothing, but it must amount to what in your judgment is an agreement between the parties." Due exceptions by appellant challenge the correctness of the law as thus propounded by the learned trial judge; and we are of the opinion that it is not in accordance with the rule laid down by the Court of Appeals in *Hawkins* v. *Pemberton*, 51 N. Y. 198; namely: "In order to constitute a warranty upon a sale, it is not necessary that the representation should have been intended by the vendor as a warranty. If the representation is clear and positive, not a mere expression of opinion, and the vendee understands it as a warranty, and, relying upon it, purchases, the vendor cannot escape liability by claiming that he did not intend what his language declared." To the same effect is *Fairbank* v. *Metzger*, 118 N. Y. 260.

In any event, though the language of the learned judge be not clearly in conflict with the authorities, yet is it still so misleading that we cannot doubt that its effect on the jury was prejudicial to the interests of justice.

Judgment reversed and new trial ordered, costs to abide the event.

Daly, Ch. J., and Bischoff, J., concur.

Judgment reversed and new trial ordered.

Roome *v.* Jennings.

(New York Common Pleas—General Term, February, 1893.)

A vendor who rescinds a contract of sale for fraud of the vendee and retains the property sold, cannot maintain an action for deceit against the vendee.

Fraud without damage will not support an action of deceit.

Appeal from General Term of the City Court affirming judgment on a verdict. The opinion states the case.

James L. Bishop, for defendants (appellants).

F. A. Thomas, for plaintiffs (respondents).

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PRYOR, J. It is impossible to sustain this judgment.

The pleading is peculiar, but in effect, the action is by a vendor to recover damages for a fraudulent representation in the purchase of a chattel. The complaint states a cause of action for deceit and for nothing else; the case was tried as an action for deceit; and the argument on the appeal still treats the action as for deceit.

But, the complaint alleges a rescission of the contract of sale by the plaintiffs because of the defendants' fraud; and on the trial the rescission was established by uncontroverted and conclusive evidence. How, then, can plaintiffs maintain an action for fraud in the contract?

Such an action proceeds upon an affirmance of the contract, seeks damages for the fraud in its concoction, and the measure of damage is the injury ensuing from the operation of the contract. On the other hand the rescission of a contract annuls it *ab initio*, and places the parties in the positions they would have occupied if it had never existed.

Upon the discovery of fraud inducing a contract, the injured party has an election, namely, he may either rescind the contract or stand to it. If he rescind he may assert his title to the property lost by the contract and recover it by replevin or its value in trover. If he affirm the contract, his only redress, as here, is an action or counterclaim for the damages sustained by reason of the fraud in its concoction. But he cannot do both; he cannot affirm and disaffirm; he cannot repudiate the contract as rescinded and demand restitution of what he has lost, and at the same time treat it as subsisting and recover the damages he has suffered by reason of it. When he reclaims what he lost by the fraudulent contract, he obtains in law complete reparation, or, if in fact this be not so, it is the effect of his own folly in not abiding by the contract and claiming compensation for the damage he sustained by incurring the obligation of the contract. An election once made between these alternative remedies is irrevocable, so that by rescinding the contract the party is precluded from recourse to any relief implying its continuing obligation.

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These principles are elementary, and yet possibly it may not be amiss to recall some authorities in illustration of their effect. *Degraw* v. *Elmore*, 50 N. Y. 1, 3; *Kinney* v. *Kiernan*, 49 id. 164; *Miller* v. *Barber*, 66 id. 558, 564; *Whitney* v. *Allaire*, 4 Denio, 554; *Masson* v. *Bovet*, 1 id. 69; *Lindsley* v. *Ferguson*, 49 N. Y. 623, 625; *Schieffer* v. *Dietz*, 83 id. 300, 308; *White* v. *Seaver*, 25 Barb. 235, 241; *Strong* v. *Strong*, 102 N. Y. 69; *Krumm* v. *Beach*, 96 id. 398; *Bowen* v. *Mandeville*, 95 id. 237. "A party defrauded in a contract may stand by it and recover damages resulting from the fraud, or he may rescind the contract and recover back what he has paid or sold." 5 Wait's Act. & Def. 515; 3 id. 454.

The fact is conceded, that upon the pretense of the fraud, the plaintiffs refused to deliver the property. The contract having been rescinded and the property retained by the plaintiffs, they are estopped by their election from maintaining an action against the defendants for fraud in the purchase. *Taussig* v. *Hart*, 49 N. Y. 302.

Another insurmountable bar defeats the action, namely, that the fraud, if any, was of no damage to the plaintiffs.

The fraud alleged is, that the defendants induced the plaintiffs to contract by the false representation that the sale was to another, whereas the purchase was by the defendants themselves. It is not pretended that the goods could have been sold to another for a greater sum, and the defendants offered to pay the contract price; how then were the plaintiffs damaged? Indeed, it is inconceivable that a vendor induced to sell by fraud, can sustain damage when he cancels the sale and retains the property, *i. e.*, when he does not sell.

But, it is immemorial law that fraud without damage will not support an action. *Taylor* v. *Guest*, 58 N. Y. 262, 266; *Wemple* v. *Hildreth*, 10 Daly, 481, 484.

The judgment is probably untenable upon other grounds, but enough is already shown to require its reversal.

Judgment reversed and new trial ordered, costs to abide event.

Bookstaver and Bischoff, JJ., concur.

Judgment reversed and new trial ordered.

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Gray v. The Journal of Finance Publishing Co.

(New York Common Pleas — General Term, February, 1893.)

Plaintiff, an attorney at law, contracted with defendant for the publication of a legal notice for a stipulated period. In an action brought for a breach thereof one of the defenses was that plaintiff was not the real party in interest and had no right to recover any sum from defendant. The evidence disclosed that plaintiff was not known to be acting for any one but himself. On trial the complaint was dismissed. *Held*, error; that the fact that plaintiff was a lawyer had no bearing upon the case; that in contracts made by attorneys, acting as such, they are capable of suing and are liable to be sued in the same manner as other agents or factors.

Appeal from a judgment of a District Court of the city of New York, dismissing the complaint herein. The opinion states the case.

Thomas F. Murtha, for plaintiff (appellant).

David May, for defendant (respondent).

Bookstaver, J. The plaintiff, an attorney at law, was employed by the executors of the estate of Clinton Gilbert, deceased, to take proceedings in the Surrogate's Court for the probate of the will of said Gilbert. In order to obtain jurisdiction over the many parties interested in the probate, it became necessary to publish a citation against a number of nonresident next of kin. To this end, an order was made by the surrogate of the county of New York on or about December 14, 1891, directing the service of the citation upon such nonresident parties by publication in the New York Law Journal and in the Journal of Finance, the defendant herein, once a week for six successive weeks, commencing on December 18, 1891. The defendant published the citation on December eighteenth and again on December twenty-fourth, but failed to publish it during the succeeding and third week of the period, as directed by the surrogate's order. The results of this failure were that the services by publication became invalid, both as to the defendant's newspaper and as

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to the Law Journal, and hence it was necessary to prepare a petition for a supplemental citation and obtain an order from the surrogate vacating the former order and directing a new publication of the citation in the Law Journal and another newspaper, thus adding the expense of an entirely new publication to the expenses already incurred. Plaintiff brought this action to recover these disbursements and also for his services and labor, rendered necessary by defendant's breach of contract. Upon the trial three defenses were interposed: (1) That the plaintiff was not the real party in interest and had no right to recover any sum from the defendant; (2) That he was not acting for and on his own behalf but as attorney at law and the agent of the proponents of the will of Clinton Gilbert, deceased, and (3) That the defendant complied with its agreement with plaintiff and published the citation for a period of six successive weeks, commencing on January 4, 1892. We think none of these grounds was a sufficient defense to the action.

The plaintiff made a contract with the defendant, paid it the contract price, and in this matter the defendant dealt with the plaintiff alone and no one else. The answer admits that it made the contract with him. It received his money and made out its receipt for the advertising to the plaintiff; it knew of no one in the transaction except the plaintiff, and there was no allegation in the answer, nor was there any proof, that it knew that the plaintiff was acting as agent or attorney, or that anyone at all was behind him. Besides, at that time no executor had been appointed for the estate, and the advertising was a part of the proceedings in order to the probate of the will. In so far, then, as the defendant was concerned, the plaintiff was the principal, or at any rate an agent with an undisclosed principal. The rule of law is well settled that where an agent, in his own name, without disclosing his principal, makes a contract, either the agent or the principal may sue upon it. Story's Agency, § 396; *Ludwig* v. *Gillespie*, 105 N. Y. 653; *Considerant* v. *Brisbane*, 22 id. 389; *Pitney* v. *Insurance Co.*, 65 id. 6; *Schaefer* v. *Henkel*, 75 id. 378;

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Knapp v. *Simon*, 96 id. 284; *Arosemena* v. *Hinckley*, 43 Super. Ct. 43; *Bogart* v. *O'Regan*, 1 E. D. Smith, 591; *Davis* v. *Reynolds*, 5 Hun, 651. Section 449 of the Code of Civil Procedure provides: "Every action must be prosecuted in the name of the real party in interest. * * * A trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." The fact that the plaintiff was a lawyer has no bearing upon the determination of the question under consideration. In contracts made by attorneys acting as such, they are capable of suing and are liable to be sued in the same manner as other agents or factors. Story's Eq. Juris. § 313; *Howell* v. *Baker*, 4 Johns. Ch. 118; *Brock* v. *Barnes*, 40 Barb. 521. In the latter case, it was said: "The relation existing between them (attorney and client) was one of confidence. If not that of attorney and client, it was that of principal and agent, and in either case the principles of law applicable to the case are the same." The courts have in many instances supported this rule of law. An attorney is liable for sheriff's fees. *Adams* v. *Hopkins*, 5 Johns. 252; *Ousterhout* v. *Day*, 9 id. 114; *Reilly* v. *Tullis*, 10 Daly, 283. So, also, he is liable for referee's fees (*Dinkel* v. *Wehle*, 11 Abb. N. C. 124), and for fees of counsel engaged to conduct litigation. *MacNiffe* v. *Ludington*, 13 Abb. N. C. 407. Also, for printing legal notices in newspaper. *Press Publishing Co.* v. *Baker*, 13 N. Y. Supp. 822. The underlying principle in all these cases where attorneys have been held, is that their liability is based on the fact of the contract being made by them, and without the disclosure to, or knowledge by the plaintiffs of the client's existence. In the case at bar, the plaintiff was not known to be acting for anyone but himself; he did not even disclose his profession of attorney, and the defendant treated with him on the basis of his own individual responsibility, and made out its bill and receipt to him as an individual acting solely for himself.

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If the executors of Gilbert, deceased, should sue, the defendant could set up a double defense; first, that it never knew or dealt with the executors, and second, that as matter of fact, there were no executors in existence at the time of the making of this contract, since the executors were appointed long after the publication of the citation. On the other hand, no justice or hardship can accrue to the defendant if the plaintiff succeeds in this action, because a payment to an agent or attorney will bind his principal, and the defendant would be fully protected by a judgment in plaintiff's favor against any suit by the executors. *Ludwig* v. *Gillespie*, 105 N. Y. 653.

The failure of the defendant to publish the citation in the third week, was a breach of its contract and vitiated the entire publication and service. The surrogate's order of publication directed that the service of the citation should be made by publishing the same once a week, for six successive weeks, and the defendant undertook and agreed with the plaintiff to publish the citation in this manner. The answer admits this and the uncontradicted testimony shows it. The rule for the publication of a citation is the same as that for the publication of a summons in an action. Code of Civil Procedure, §§ 440, 2524; *In re Koch's Will*, 12 N. Y. Supp. 94. Where it is sought to obtain jurisdiction over nonresident parties by making service of a summons by publication, the requirements of the Code in respect thereto must be strictly complied with. *Kendall* v. *Washburn*, 14 How. Pr. 380; *Bunce* v. *Reed*, 16 Barb. 347, 350; *Olcott* v. *Robinson*, 20 id. 148. The surrogate directed the citation to be published once a week for six successive weeks. This has been held to mean a distinct publication in each of the six weeks succeeding the first. *Wood* v. *Knapp*, 100 N. Y. 109; *Market Nat. Bank* v. *Pacific Bank*, 89 id. 398. In the latter case the court said "It (the Code) does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks." See also *Steinle* v. *Bell*, 12 Abb. (N. S.) 171; 2 Bouv. Law Dict. 347.

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The publication commencing on the 4th of January, 1892, even if made as claimed by the defendants, did not comply with the terms of the contract. It is clear that such a publication could not have been completed before the return day of the citation and, therefore, was of no legal effect.

We, therefore, think the court erred in dismissing the complaint and that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Bischoff, J., concurs.

Judgment reversed and new trial ordered.

Domestic Sewing Machine Co. v. Barry.

(New York Common Pleas—General Term, February, 1893.)

Defendant rented of plaintiff a sewing machine under a written contract, with privilege of purchase, title to remain with plaintiff until the money agreed upon had been fully paid. By mutual agreement the first machine given to defendant was exchanged for another, whereupon the number of the new machine was inserted in the contract in lieu of the old, without defendant's knowledge. Upon this ground chiefly, the trial justice gave judgment for defendant. *Held*, error; that the alteration was not a material one, as it did not in any way change the terms of the contract.

Appeal from a judgment rendered against plaintiff in a District Court of the city of New York. The opinion states the case.

H. B. Kinghorn, for plaintiff (appellant).

Anthony J. Griffin, for defendant (respondent).

Bookstaver, J. This was an action of claim and delivery to recover the possession of a Domestic sewing machine, No. 1,150,468, which the defendant had rented of the plaintiff, under the usual contract, with privilege of purchase upon paying the agreed value, in this case sixty

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dollars. The defendant paid five dollars cash and received a credit of ten dollars for an old machine, and thereafter the rent was to be five dollars per month, and the defendant was to be allowed a discount of ten dollars additional if she elected to purchase and pay cash for the machine within sixty days. The contract further provided that the title to the machine should remain with the plaintiff until the money agreed upon had been fully paid. On the trial it appeared that the first machine given to the defendant was not satisfactory, and another was given her, whereupon the number of the new machine was inserted in the contract in lieu of the old, as defendant claims, without her knowledge, and it was upon this ground, chiefly, that the justice based his judgment in defendant's favor. While it is quite true that any material alteration of a written contract without the consent of both parties to it will avoid it, yet in this instance we do not think it was in the least material, as it only conformed the agreement to the facts, went but to the identity of the machine, and did not in any way change any of the terms of the contract. The defendant herself distinctly testified that she did not look at the number as anything, and even on the argument of the appeal in this case the respondent admits as much, but claims that it was sufficient in order to enable the defendant to offer proof varying the contract. In this we think the counsel and the court below erred, and that the written contract, notwithstanding the erasure, should control the agreement between the parties. Besides, the learned judge who tried the case, who was so uniformly careful in his decisions, evidently erred in regard to the amount tendered and as to the amount which was to be tendered, for his statement of these amounts differs from the testimony given by the defendant herself.

The judgment should, therefore, be reversed, and a new trial in the court below ordered, with costs to the appellant to abide the event.

Bischoff, J., concurs.

Judgment reversed and new trial granted.

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Manning *v.* Maas.

(New York Common Pleas—General Term, February, 1898.)

Fraud avoids all contracts, and when properly pleaded, evidence thereof should be admitted. The exclusion of such evidence is error, for which a new trial will be granted.

Appeal from a judgment for plaintiff, entered in a District Court of the city of New York.

A. Stern, for defendant (appellant).

P. Q. & F. L. Eckerson, for plaintiff (respondent).

Bookstaver, J. This action is brought for a breach of contract on the part of the defendant, in refusing to carry out a contract for the purchase of an Otto gas engine. Defendant admitted the making of the contract, but claimed that the same was procured by fraud, in that the plaintiff fraudulently represented that the approval of one McCallum had been obtained, without which approval the defendant would not have entered into the contract. Upon the trial, various questions were asked by the defendant, tending to show this defense, but the same were objected to by plaintiff's counsel, and the testimony thereunder was excluded, to which the defendant excepted. Fraud avoids all contracts, and when the same is properly pleaded, evidence thereof should be admitted, and the exclusion of such evidence in this case, was error, for which a new trial should be granted. Nor was that error cured by the court subsequently admitting a portion of this evidence, but not the whole. The fact that the court permitted the witness Bailey, plaintiff's agent, to contradict the defendant, in regard to conversations with him, does not cure the error, in refusing to permit the defendant to testify in regard to those matters, but rather aggravates it. But, aside from this, it was fatal error in the court below to propound to the plaintiff this question: "How much have you suffered by the refusal?" meaning the refusal to complete the contract, which was objected and excepted to by the defendant. It

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called for the conclusion of the witness on a matter the court was to determine for itself after all the facts in the case had been given. The mere conclusion of the plaintiff as to his loss of profits, without stating the cost to him of the engine, or the value of the work, labor and services to have been rendered by him in putting it up, was not sufficient evidence on which the court could properly base an estimate of damages.

Having arrived at this conclusion, it is unnecessary for us to consider at this time the proper rule of damages in such case, as on a new trial it may more clearly appear that the engine sold was a patented article, and could be procured of the plaintiff only, or that it was sold openly in the market, and had a value determined by supply and demand, a different rule of damages being applicable in the latter case.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

Bischoff and Pryor, JJ., concur.

Judgment reversed, and new trial ordered.

Hutton Bros. *v.* Gordon.

(Rockland County Court — February, 1893.)

In the absence of an agreement by the owner making himself personally liable for the claim of a subcontractor, the latter has a claim against the property no further than the amount unpaid on the contract at the time of filing his lien.

Action to foreclose a mechanic's lien. The opinion states the case.

A. & A. X. Fallon, for plaintiff.

John McCormick, for defendant and owner Lizzie S. Gordon.

Arthur S. Tompkins, for defendants Hartwicke, Meyers and Trasback.

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Wm. McCauley, Jr., for defendant Moore.

George A. Wyre, for defendants Eckerson & Elvery.

WEIANT, County J. This action is brought to foreclose a mechanic's lien on land of the defendant Lizzie S. Gordon.

The defendant Gordon being the owner of certain lots at Congers in this county, on December 11, 1890, entered into a written contract with Butler & Thurston, a firm of builders, whereby they agreed to construct a dwelling for her upon said lots on or before April 15, 1891, for the consideration of $1,700.

This agreement was on or about August 13, 1891, superseded by a new contract in writing, entered into between the same parties, whereby said Butler & Thurston agreed to construct said dwelling and furnish all materials for the like consideration, to be paid to them in three equal payments, one when the house was "raised, framed and inclosed;" the second "when the plastering is all complete;" and the third "when the house is finished and completed according to the plans and specifications." The house was to be erected and finished on or before November 15, 1891. The work was to be done to the satisfaction and under the direction of one David L. Allen. The contract provided that at any time during the progress of constructing the building the owner might request any alteration of, addition to, or omission from the contract, and that the same should in no way affect the contract, but that a reasonable valuation should be added to or deducted from the contract price accordingly.

It was, also, provided that should the contractors, at any time during the progress of the work, refuse or neglect to supply a sufficiency of materials or workmen, the owner should have power to provide materials and workmen, after three days' notice in writing being given the contractors to finish the said work, and the expense should be deducted from the amount of the contract. The contract, also, contained a covenant on the part of the contractors to pay to the owner ten dollars for every day the said building should be incomplete after November 15, 1891. The contractors proceeded with the

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construction of the building under this agreement until about the 1st of December, 1891. The work had been sufficiently advanced to entitle the builders to the first two installments of payment, and the owner had made the same in compliance with the contract, amounting to $1,133.33, the latter one of which was made September 26, 1891. The builders proceeded with their work some time thereafter, and now claim that at the time they ceased, they had done work and supplied materials to the value of $1,200, $1,300 or $1,400. Differences arose between the builders and the owner as to whether or not the work and materials were in compliance with the contract, and as to changes and alterations in portions of the structure. The work was delayed, and finally the builders refused to proceed with the work and complete the building, and finally ceased the latter part of November or 1st of December, 1891.

Negotiations and conferences followed between the parties for the purpose of adjusting these differences and bringing about the completion of the building. On or about December 29, 1891, it appears that at a conference in New York city an amicable arrangement was reached, under which the builders were to proceed and finish the building under the contract, with certain alterations. This arrangement was reduced to writing, but the contractors refused to execute the same or to proceed with their work unless the owner, Mrs. Gordon, would release them from any liability for the ten dollars a day that they were obligated to pay under the contract for failure to complete the building within the time required by the contract. Thereupon, about January 5, 1892, the owner caused a written notice to be served upon the contractors, in which she stated that unless they proceeded within three days to the completion of the building as provided by the plans and specifications, she would proceed to complete the building and hold them responsible for all expense thereof.

The contractors refused to proceed, and the owner then proceeded to complete the building, and for the same incurred an expenditure and cost of about $685. The plaintiff, a cor-

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poration, under purchases made by Butler & Thurston, the contractors, between August 22 and December 15, 1891, furnished materials and delivered the same to be used in the construction of this building in question to the amount and value of $329.20, of which $100 was paid by such contractors. Upon January 16, 1892, it filed a notice of lien for $229.20, for materials delivered to said Butler & Thurston, to be used in the construction of said building. There is not sufficient evidence to connect the owner, Mrs. Gordon, with the furnishing or use of these materials so as to establish a personal liability against her.

The plaintiff must, therefore, rest as to the liability of the lands in question upon the relations established between her and the contractors, Butler & Thurston. It is, therefore, necessary that we should first give consideration to the legal status of the contractors and owner. It is conceded that Butler & Thurston did not complete their contract and abandoned the construction of the building. This I do not think they were justified in doing under the facts and circumstances, even if their contention be true that Mrs. Gordon was wrong in her claims as to the alterations, deviations from or failures to comply with the plans and specifications for, as appears, the contract provided for all such contingencies, and did not authorize an abandonment of the work for any differences such as arose between these parties. If Mrs. Gordon were in error in her claims the contractors were not relieved from carrying out the agreement on their part. Upon their refusal to proceed and complete the building, Mrs. Gordon, in accordance with the right given her under the contract, proceeded to complete the building, and pursuant to its provisions, she is entitled to deduct the expense thereof from the amount of the contract price, or any moneys Butler & Thurston may have earned. She thereafter, in January, 1892, entered into a written contract with one Theodore A. Dubois to complete the building (meaning the carpenter work) in accordance with the same plans and specifications, for the sum of $195, but not including a claim of Mead & Taft for materials of $83.39.

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The evidence shows that she actually paid out or legally obligated herself to pay in the aggregate to thus complete the building the sum of about $685, excluding certain several omissions that were supplied to conform the building to the contract, which together exceeded the entire amount of the last payment and extras, if any under the contract, by at least the sum of $100, which would have been due and payable to Butler & Thurston if they had performed their contract, and even with such extra compensation, if any, as had been earned by them in addition.

Under such circumstances, Mrs. Gordon's lands cannot be subjected to the lien of the plaintiff, although Butler & Thurston had done work and furnished materials after the second payment under their contract. *Cheney* v. *Troy Hospital*, 65 N. Y. 282; *Larkin* v. *McMullin*, 120 id. 206, and cases there cited; *Foshay* v. *Robinson*, 16 N. Y. Supp. 817; *Van Clief* v. *Van Vechten*, 130 N. Y. 572. In the latter case it is said that "they (meaning subcontractors) are under the same obligations to prove performance and to the same extent that he (the contractor) would be. Their rights as lienors are measured by his rights under the contract."

The plaintiff delivered some materials after Butler & Thurston ceased work, which were subsequently used in the completion of the building by Mrs. Gordon or her agents or employees.

These consisted of window sash and some lumber of the value of $18.40. But the same were sold and delivered to Butler & Thurston upon their order and credit, and, therefore, upon such delivery of the same became the property of that firm, and the same rule that precludes the plaintiff from recovering for the other portion of its claim seems, also, to prevent a recovery for this latter sum. Nor by using these materials did any personal liability arise on Mrs. Gordon's part to the plaintiff. The title to the same was in Butler & Thurston.

Such knowledge and assent as to the using of such materials on her part may be sufficient to authorize a lien but not a contract creating a personal liability. *Spruck* v. *McRoberts*,

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19 N. Y. Supp. 129. Indeed, the plaintiff in its complaint does not contain any allegations looking to charge Mrs. Gordon personally, and such relief is not asked. The plaintiff is, however, entitled to a personal judgment against the defendants Butler & Thurston for the balance of their debt, which appears to be $229.25. As to the claim of the defendant Hartwicke, who did the mason work, the same rules applied as above to the claim of the plaintiff, are applicable to him as a subcontractor under Butler & Thurston.

There appearing to be nothing due Butler & Thurston for the labor performed and the materials furnished by them in the construction of the building, after deducting the cost incurred by Mrs. Gordon in completing the building in accordance with the contract, he cannot recover on his lien.

Hartwicke's lien was filed November 27, 1891. He has no lien for labor done or materials furnished after that date, for his notice of lien does not cover labor to be performed or materials to be supplied thereafter. His answer admits that. The notice of lien must specify the materials to be furnished or labor to be performed and whether all the work or materials for which the claim is made has been actually performed or furnished, and if not, how much of it, etc. Chap. 342, Laws of 1885, § 4. Failure to comply with this requirement is fatal to the lien. *Close* v. *Clark*, 9 N. Y. Supp. 538; *Foster* v. *Schneider*, 2 id. 875; *Bulkley* v. *Kimball*, 19 id. 672.

This subcontractor testifies that Mrs. Gordon promised to pay him his claim while he was working for Butler & Thurston, if he would release his lien, which at that time he had filed, and which he did. Mrs. Gordon denies this. But if she did so agree it imposed no legal obligation upon her. Every special promise to answer for the debt of another is void unless in writing and subscribed by the promisor. 3 R. S. (5th ed.) 221, § 2. Hartwick, however, did some work on these premises of the owner after she had taken upon herself to complete the construction of the building. It seems to me that the evidence leads to the conclusion that such work was done for her and with her assent or that of her agent, and as her

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employee. He thus constructed the cesspool for fifteen dollars; he performed extra work in plastering, twenty-four dollars; plastered a partition a second time owing to a change of the same, the value of which was ten dollars and eighty cents; and did work upon an arch of the value of three dollars, making an aggregate of fifty-two dollars and eighty cents, and for which sum Hartwicke is entitled to personal judgment against her. *Wollreich* v. *Fettretch*, 4 N. Y. Supp. 326; *Thomas* v. *Sahagan*, 10 id. 874.

He is also entitled to judgment against the defendants Butler & Thurston, for the sum of $181.20, which I find to be their indebtedness to him for his labor done and materials furnished in constructing this building, not including the fifty-two dollars and eighty cents above charged against Mrs. Gordon. The claims and liens of the defendants Frederick Meyers, Bernic Trasback and Newton Smith of course must fall for reasons already advanced. They were employees of or furnishers of materials to the defendant Hartwicke, and there being nothing due from the defendant Gordon, under his lien nor at the time the liens of these subcontractors were acquired, their liens must fall with his. There being no proof that they did work under the employment of Mrs. Gordon, they cannot by the judgment in this action be awarded payment from the sum due Hartwicke from Mrs. Gordon personally.

The two proved their claims to the amounts of twenty-seven dollars and seventy-five cents and twenty-two dollars and fifty cents respectively. The two former may have judgment against the defendant Hartwicke, for the said amounts owing them respectively. The defendant Smith gave no proof of his claim, nor interposed any answer, and consequently he is not entitled to any affirmative relief. *Morgan* v. *Stevens*, 6 Abb. N. C. 356; Code Civ. Proc. § 521; chap. 342, Laws of 1885, § 17.

The lien of the defendant Moore, for tinning and hardware is ineffective for the reasons assigned as to the liens of the claimants, Hutton Brothers, and Hartwicke. His lien was filed December 2, 1891, and his notice does not specify that he

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claims a lien for future labor to be performed or materials to be furnished, and as we have seen from the authorities cited, his notice of lien is insufficient to cover such.

This makes it unnecessary to determine the question as to whether his notice of lien was insufficient because of the error in the same as to the numbers of the lots. He did, however, at the instance and employment of the owner, Mrs. Gordon, after the filing of his lien, and independently of a claim thereunder, do some tinning upon the piazzas and placing of gutters and leaders thereon, of the value of fourteen dollars and sixty-two cents, for which sum he is entitled to a personal judgment against the defendant Gordon, less five dollars paid, and against the defendants Butler & Thurston for the sum of $113.38, that appearing to be the amount that they owe him, after crediting the payment of thirty-five dollars.

The remaining claim for consideration is that of the defendants Vincent B. Eckerson and Asa W. Elvery, who did business as painters under the firm name of Eckerson & Elvery.

They were subcontractors under Butler & Thurston to do the painting of the building and furnish the materials therefor, for $100. They proceeded with their work under Butler & Thurston, but claim that seventy-five dollars worth of the work was done and materials furnished after Butler & Thurston quit. They testify that they did not complete their work until about the middle of April, 1892.

They filed their lien June 9, 1892, for $100. The evidence discloses that Mrs. Gordon continued these defendants in their work of painting. She seems to have considered them in her employ, for she had a conversation with Mr. Eckerson in which she testifies that they signified their willingness to accept fifty dollars as satisfactory, and she thereupon informed them of the source from which she was to obtain her money and stated that she could not pay them until the house was finished, and that they said that if they were paid for their labor they were satisfied, and named fifty-four dollars or fifty-six dollars as the sum. This is undenied.

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My conclusion as to the rights of these defendants is that their lien, having been filed after the completion of their labor and furnishing of their materials, is valid and enforceable to the extent of the value of the labor performed and materials supplied, after Mrs. Gordon assumed the performance of the contract, for they were then her employees. *Richardson* v. *Reid*, 3 N. Y. Supp. 224; *Riggs* v. *Chapin*, 7 id. 765–769; *Wollreich* v. *Fettretch*, 4 id. 326.

I find the value of the same to be fifty-six dollars, and sustain their lien for that amount; and for the balance of the contract price with Butler & Thurston, being forty-four dollars, they are entitled to judgment against those defendants personally.

There is testimony to the effect that in the course of the progress of the work upon this building, that Mrs. Gordon, or some one representing her, visited the building, inspected the work, and in such method or otherwise acquired knowledge or information which is sufficient to call for finding that she became personally liable to the subcontractors for work done or materials furnished other than such as she has been charged with above. I do not understand such to be the law.

The proof must go far enough to authorize a finding that it was her purpose and intention to become the employer or purchaser. But in the absence of an agreement by the owner making himself personally liable for the claim of the subcontractor, the latter has a claim against the property no further than the amount unpaid on the contract at the time of filing his lien. *Riggs* v. *Chapin*, 7 N. Y. Supp. 769. In that case Chief Judge McAdam writing the opinion says: "But where an owner employs a contractor and pays him all he contracted to pay, not in advance, but as the work progresses; not collusively, but in good faith, he cannot be again compelled to pay, simply because the contractor subsequently fails to pay those he employed. The contractor has the right to employ assistants, "without the consent of the owner."

The nature of the work would imply that he must. These employees are selected by, and are under the exclusive control

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of the contractor, who makes his own contracts with them, and superintends their performance. Mechanics are not compelled to accept employment under him, neither are material men bound to credit him; and, if they do, they must look to his personal credit, or see to it that their notices of lien are filed in time to stop the payments coming from the owner to the contractor according to the terms of the contract, or their effort to acquire a lien on the property may prove abortive."

The defendant Gordon, in her answer, sets up a counterclaim against Butler & Thurston, the contractors, for the ten dollars per day which they, by their contract, agreed to pay her for every day the said building is uncompleted after November 13, 1891, and which she claims aggregated the sum of $1,620 when the building was finally completed, about May 1, 1892.

This seems to be a valid counterclaim. *O'Donnell* v. *Rosenberg*, 14 Abb. Pr. (N. S.) 59; *Morgan* v. *Stevens*, 6 Abb. N. C. 356–363; *Pettis* v. *Bloomer*, 21 How. Pr. 317; *Ward* v. *Hudson River Building Co.*, 125 N. Y. 230.

That, however, as regards the rights of the lienors in this case, is immaterial, for the reason that I have determined there was nothing due Butler & Thurston over and above the expenses which Mrs. Gordon has paid or incurred in completing the building.

It is simply, therefore, a question as to whether Mrs. Gordon is entitled to a personal judgment against Butler & Thurston for such damages.

I am not prepared at this time to dispose finally of this question. I have no proof before me that a copy of this answer was served on those defendants as required by section 521 of the Code of Civil Procedure. It seems that is essential in order to award such relief as is asked. Assuming that she is entitled to such a personal judgment, she cannot recover such an amount. She can only recover the ten dollars per day for such time as elapsed between November 15, 1891, and the time Mrs. Gordon assumed the completion of the contract, and such further period of time thereafter within which the

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building could have been completed with diligence and promptness. *Morgan* v. *Stevens*, 6 Abb. N. C. 356–363. The question of waiver may also bear materially upon this matter. *Bigler* v. *New York, etc., Transp. Co.*, 5 N. Y. Supp. 347. This question may be disposed of upon settlement and entry of the judgment. Judgment is accordingly directed as follows:

That the complaint be dismissed on the merits as to the defendant Gordon, and the plaintiff's lien canceled, with costs against the plaintiff; and that the plaintiff have judgment against the defendants Butler & Thurston, for $229.25, with interest, and costs as upon default. That the defendant Hartwicke's lien be declared invalid and canceled of record, and that he have personal judgment against the defendant Gordon for fifty-two dollars and eighty cents, with interest, but without costs to either party as against the other.

That said Hartwicke have judgment against the defendants Butler & Thurston for $181.20, with interest, and costs as on default.

That the liens of the defendants Meyers and Trasbeck, are invalid and be canceled, and that they have judgment against the defendant Hartwicke for the respective amounts of twenty-seven dollars and seventy-five cents and twenty-two dollars and fifty cents, with interest, and costs as on default, and that the lien of the defendant Smith be canceled, and the case as to him be dismissed, without costs.

That the lien of the defendant Moore is invalid and the same be canceled, and that he have judgment against the defendant Gordon, individually, for fourteen dollars and sixty-two cents, and interest, but without costs, and that he have judgment against the defendants Butler & Thurston for $113.38, with interest, and costs as on default.

That the defendants Eckerson & Elvery have judgment for the enforcement of their lien to the amount of fifty-six dollars and interest from the filing of the same, with a trial fee of thirty dollars costs, and upon payment thereof that their lien be canceled; and that they have judgment against

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the defendants Butler & Thurston, for the sum of forty-four dollars, with interest, and costs as upon default.

The allowances of costs as above have been made in an equitable sense and seem to accord with authority. *Morgan* v. *Stevens*, 6 Abb. N. C. 356. I will hear counsel further on settlement of the judgment.

In re Estate of Goetschius, Deceased. No. 1.

(Surrogate's Court — Rockland County, February, 1883.)

A gift for life of rents and income of real estate creates an estate therein, and if no duties are charged upon executors with respect to their application, no estate or trust is created in them in respect thereto.

It seems, however, that title to and right of custody of personalty, where the contrary is not expressly provided, is primarily in executors for the purpose of protection until final disposition.

An executor who collects income without authority, renders himself individually liable, and a Surrogate's Court has no jurisdiction to entertain an accounting therefor; and if he invests and uses the personalty to his individual purposes he is chargeable with such interest as the investments earned, as well as profits realized on sale or exchange thereof.

Application for a judicial settlement of the account of proceedings of a surviving executor. The opinion states the case.

Snider & Hopper, for executor.

Arthur S. Tompkins and *D. D. Sully* for contestants.

Weiant, S. The testator, Harmon Goetschius, died on or about August 19, 1859, leaving a last will and testament, which was admitted to probate by the Surrogate's Court of this county on or about November 28, 1859, and letters testamentary thereof were thereupon issued to the executors therein appointed, the accounting party hereto, John H. Goetschius, and one George Goetschius, two sons of the testator.

The executors caused an inventory of the personal estate of the deceased to be made and filed in said surrogate's office on the 19th day of December, 1859, showing assets amounting to

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$2,282.10. The two executors entered upon the administration of the estate and continued therein together until the death of George in the year 1870, since which time the accounting executor has solely acted in such administration.

The widow of the testator, Fanny Goetschius, died on or about April 19, 1891, leaving a last will and testament, which was thereafter, on May 25, 1891, proved and letters testamentary granted to Stephen Van Orden and John R. Wanamaker, as executors thereof.

The testator by his will by bequest and devise, made the following provision for his widow: "I give, bequeath and devise to my beloved wife Fanny, the use and occupation, income and profit of all my real and personal estate, to have and to hold the same for and during her natural life; and I do further order and direct that my sons John Henry and George shall cut, haul and prepare for burning, firewood sufficient for her use; and further, it is my wish and desire that she remain in the house we now occupy, but if she prefers to take up her residence with any other person or place she is at liberty to do so; and she is at liberty to surrender her claim or any part thereof to my estate to my children, if she thinks proper, and after her death I give, devise and bequeath my real and personal estate to my children and grandchildren in manner and form following, to wit:" Here follows a devise of a parcel of land to his daughter Catharine; a devise to his sons John Henry and George of the remainder of his real estate in the town of Ramapo; a bequest of the sum of $800 to Catharine Louisa, the daughter of the testator's deceased son Stephen, to become due and payable when she shall arrive at the age of twenty-one years; but if the testator's wife Fanny is living at that time, then to become due and payable to her one year after the death of his said wife; a bequest of $100 to a grandson, Harmon Goetschius Bogart, together with certain specific articles of personalty; a bequest to Elizabeth Bogart and Harmon Goetschius, children of the testator's deceased daughter, Maria, each of $500, to become due as they respectively arrive at the age of twenty-one years,

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or if the testator's said wife is then living, then to become due one year after her death, and in certain contingencies to the survivor; a legacy of $100 to Henrietta, the widow of testator's son, Stephen; a devise and bequest of the portion of the estate of George M. Goetschius, deceased, which the testator expected to receive on the distribution of that estate, to his daughter, Catherine, and his two sons, John and George; and a devise and bequest of all the rest, residue and remainder of his estate, to his three children, Catherine, John and George, and his grandchildren, Catherine Louisa Goetschius, Elizabeth Bogart, and Harmon Goetschius Bogart, to be equally divided between them, share and share alike.

It thus appears that the executors, as such, are given no authority or control over the real estate of the testator, and the consideration and investigation of the income, or profits arising therefrom, and disbursements on account thereof, may be dismissed from this accounting. Those are matters to be adjusted between the individuals to whom the real estate was devised, respectively, or their legal representatives.

The executors as such were not clothed with any duty or authority as to the same. A gift to the testator's widow of the rents and income of the real estate for life creates an estate in the realty itself, and if no duties are charged upon the executors with respect to their application, no estate or trust is created in them in respect thereto. *Macy* v. *Sawyer*, 66 How. Pr. 381; *Matter of Blauvelt*, 131 N. Y. 249; *Matter of Blow*, 2 Connolly, 360, 366. As to the cutting of wood and timber from the lands devised by the testator, it also follows, that this court has no jurisdiction to hear or determine the same. That is an individual matter between the devisees and the executors in their individual capacity.

As to the personal estate, no duty seems to have been devolved upon the executors until after the death of the widow, and then only to make distribution of the same in accordance with the directions of the will, after payment of debts and burial expenses, which must necessarily have precedence. During the widow's lifetime the "use and occupa-

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tion" of all of the estate, real and personal, are given directly to the widow. No direction is given to the executors in reference to the same. They are not clothed with any express trust to receive and apply the income thereof, for the same is given directly to the widow. It seems, however, that title to and right of custody of the personalty, where the contrary is not expressly provided, is primarily in the executors for the purpose of keeping and protecting the same for final disposition in accordance with law and the directions of the will. There is a species of trust attached to every executorial office, and as was said by the chancellor in *Bowers* v. *Smith*, 10 Paige, 199, "The executor always takes the legal title to the personal estate of the testator as a trustee." *In re Shipman's Estate*, 6 N. Y. Supp. 276.

"But there is a wide difference between the trust which is attached to the executorial office and an active trust, founded upon the creation of a trust estate.

"Here there is no trust estate, no active trust, and no testamentary trustee. The duty of the executor as such continues until the falling in of the life estate. This is the settled rule as laid down in a long line of cases." Ibid., and cases there cited. "When a life estate is bequeathed in a sum of money with remainder over, the legatee is entitled only to the income, and the principal, subject to the life estate, belongs to the remainderman, and unless otherwise directed by the will, it is the duty of the executor either to invest the money and pay the interest to the first legatee during life and preserve the principal for the remainderman, or, on paying it over to the legatee, to require security from him for the protection of the remainderman in respect to the principal." *Smith* v. *Van Ostrand*, 64 N. Y. 278–282.

"In such a case there is no other trust than the law creates and vests in the executors. They take the legal title to all personal property. They must convert it into money, pay debts, expenses and specific legacies, if any, and as they are bound to execute all the provisions of the will, they are charged with a duty, as it were, to A. and B. They must

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give to A what belongs to him and then to B what belongs to him." *Livingston* v. *Murray*, 68 N. Y. 485–492.

The executors here having retained the custody and management of the personal estate, the executors of the will of the widow claim that they are accountable for the same as executors for both principal and income. I am not fully convinced that such contention is well founded. If the income was collected by them without power under the will then they become liable individually, and this court would have no jurisdiction to entertain an accounting therefor. *Matter of Cooley*, 6 Dem. 77, and cases there cited; *Matter of Blow*, 2 Connolly, 360–369. But if it be assumed that the executors as such are here accountable for the income, upon the whole case it does not appear that they have been shown to have any balance thereof in their hands.

The testimony discloses that the personal estate has been in part invested and in part used and applied to the individual purposes of the executors. They are chargeable with such interest as the evidence, which is without conflict, discloses that the investments earned, as well as for all profits realized on the sale or exchange of the securities, for they cannot make any individual gain from the trust funds. *Matter of Butler*, 1 Connolly, 58–67.

For such portion of the funds as they used for and applied to their individual benefit they must be charged with the legal rate of interest then prevailing. It is not a case for charging compound interest under the circumstances. *Matter of Kennedy*, 2 Connolly, 215. This income, however, was payable to and belonged to the widow. The accounting executor claims that all of it was paid to her in her lifetime as the same was collected, either in cash, coupons, payments in her behalf, or by goods which she received from his store. But three receipts, however, are produced which show payments of interest collected. These were given in 1864 and 1865, and are for interest accrued on savings bank deposits and a bond and mortgage.

The surviving executor testified to his having paid the

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widow all income received by them, and for the interest lawfully due the widow from the executors for the funds applied to their personal use, that they paid her with cash, goods from their store, and by paying taxes for her at her instance which she as life tenant was bound to pay, and produced receipts showing such payments. The executor is somewhat corroborated by other witnesses, who knew of payments made to the widow, and who knew of her obtaining goods from the executors' store. Sometimes the widow paid for the goods she received, which lends an inference that the executors had paid her all accrued interest, for she would most probably not have paid for any goods if the executors were indebted to her for income to which she was entitled.

The executors do not seem, at least for many years, to have kept any accounts of their transactions with the widow, and the evidence is so general and indefinite that no satisfactory conclusion can be reached. It appears, however, even assuming that the executors as such are accountable for the income of the personal estate, that the evidence is insufficient to charge the executors with any balance of income for which they were liable to pay to the widow, or now to her executors.

Again, it may be that all liabilities for such income collected more than six years prior to the widow's death are barred by the Statute of Limitations. *Foster* v. *Town*, 2 Dem. 333; *Matter of Nicholls*, 23 Abb. N. C. 479; *Mills* v. *Mills*, 115 N. Y. 80; *Brooks* v. *Brooks*, 4 Redf. 313; *Matter of Dunham*, 1 Conn. 323; *Matter of Clayton*, Id. 445; *Roberts* v. *Ely*, 113 N. Y. 128.

As to the principal personal estate the surviving executor is accountable for the same. In his inventory he charges himself with $2,280.10 of assets. As against this, he is entitled to credit for the eight dollars and seventy-five cents of accrued interest paid the widow, also, the value of the articles of personal property which he placed in the charge of the widow for her use, to which she was entitled under the will, as the same appears to have been lost by ordinary use and wear by her, except the horse bought by the executor, George Goetschius,

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for forty-five dollars, and for which he never paid. As that executor had an equal right to the custody of the funds and properties of the estate I do not think, under the authorities, that the accounting executor is liable for that item. *Matter of Demarest*, 1 Connolly, 200. As to the credit in Schedule C, for the payment of $150 for interest upon the $100 note of the testator held by George J. Snider, I do not consider that the same is allowable. The executors had moneys in their hands out of which the note should have been paid and discharged within a reasonable time after they entered upon their administration of the estate, and they could not legally fail so to do and charge the estate with the accruing interest for the long period of time that has since elapsed. *Matter of Babcock*, 2 Connolly, 82.

The item of fifteen dollars credited in the same schedule for legal services on this accounting is not properly there. That is a matter for adjustment upon the allowance and taxation of costs in this proceeding.

For the balance of the principal of the estate the accounting executor is chargeable with such interest or income as may have been earned or accrued thereon, where invested, since April 19, 1891, the date of the death of the widow; and as to the remainder, which seems to have been appropriated to their own use by the executors, the accounting executor must be charged with legal interest from the same date. The increase or decrease which resulted on the sale or exchange of securities is chargeable to the principal estate. *Matter of Lawrence*, 7 N. Y. Supp. 332.

The credit of $500 in Schedule B, being one-half of the $1,000 which the executors used in their business, cannot be allowed. That was money of the estate which went into their partnership business, and so far as this estate is concerned, both became liable for the full sum appropriated, as the moneys were so used with the assent of both.

The inventory is not before me, and it may be that the amounts and values herein stated are incorrect, and, therefore, upon the settlement of the decree the same may be therein

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corrected. I have simply indicated the rules in conformity to which the accounts must be adjusted and settled by the decree.

The amount, for which the accounting executor thus appearing to be liable, must be decreed to be applied by him first, in payment of the costs, and expenses of this accounting; then the burial expenses, if any, unpaid; next in discharge of the debts of the testator; and the remainder to the legatees agreeably to the provisions of the testator's will.

THE BRADLEY AND CURRIER CO. (Limited) *v.* LALLY.

(City Court of New York — General Term, February, 1893.)

Defendant, being insolvent, entered into a composition deed with plaintiff and other creditors, whereby they accepted in full satisfaction twenty-five per cent of their respective claims payable by his promissory note. The notes which plaintiff was entitled to under the agreement were three in number, each one being for $175.76. Plaintiff, however, would not sign off unless it received an additional note of $500, which, unknown to the other creditors, defendant gave. One of the three notes first above mentioned was paid, and this action was brought to recover upon the other two together with the $500 note. The trial justice directed a verdict for plaintiff for the full amount. *Held*, error; that as plaintiff received a money benefit not accorded to the balance of defendant's creditors, its dealings were unconscionable, such as the law stamps as fraudulent, and not only vitiated the $500 note, but also the other two. *Held*, further, that upon the testimony a verdict should have been directed for the defendant.

APPEAL from judgment for plaintiff entered on the verdict of a jury directed by the court. The opinion states the case.

Theodore H. Friend, for defendant (appellant).

George F. Alexander, for plaintiff (respondent).

FITZSIMONS, J. The defendant, a builder, in January, 1891, being insolvent, entered into a composition deed with plaintiff and his other creditors, whereby they agreed to accept from him twenty-five per cent of their respective claims to be paid by his promissory notes, at stated periods, and released him

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from the balance of their respective claims. The defendant was indebted to plaintiffs in the sum of $2,109.11 at the time plaintiffs signed the composition deed (January 14, 1891).

It received from defendant in *addition* to the notes provided for in the composition deed a note for $500, so that plaintiff received notes representing twenty-five per cent of its claim against defendant in accordance with and by virtue of the composition deed, and in addition thereto a note for $500 not within said deed, and which increased the per cent received by him in notes to forty-eight per cent of his claim. The giving of the latter note was not known or consented to by the other creditors of defendant. The notes given under the composition deed were three in number, each one being for $175.76; one was paid; this action is brought to recover upon the other two notes and the $500 note above mentioned. Judgment was directed by the learned trial justice for plaintiff for the full amount claimed, with interest, $903.10. The defendant at the trial testified that plaintiff refused to sign the composition deed unless the note for $500 was first given, which was done. The plaintiff's officers testified that defendant volunteered to give said note.

One of them testified that the note was executed and delivered just before the composition deed was signed by plaintiff; another officer said that it occurred just after the signing; but as I view the rule of law applicable to this case, it is entirely immaterial which statement is the true one. The testimony of both plaintiff and defendant is to the effect that plaintiff would not sign the composition deed, unless it received in addition to the compromise sum accepted by defendant's creditors and fixed in the deed, the $500 note in suit, thereby receiving a money benefit and advantage not accorded to or received by the balance of defendant's creditors, and which was not known to them. The dealings of plaintiff, as above stated, were unconscionable, and the law stamps such acts as fraudulent. In composite transactions, a creditor who is party thereto is not permitted to make a secret reservation of part of his claim from the operation of the compromise or stipulation

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for a *secret advantage* over the other creditors. The law exacts from all parties to a compromise the most scrupulous good faith. It enforces a wholesome morality and inculcates the principles of honest and fair dealing by defeating any advantage attempted to be gained either by working upon the necessities of the debtor, or by colluding with him. *Almon* v. *Hamilton*, 100 N. Y. 532. In this case, the plaintiff worked upon defendant's necessities. It was one of his largest creditors. It signed the deed after several other creditors had signed, and no doubt refused to do so unless the $500 note was first given. Such a transaction was undoubtedly fraudulent, and affected, permeated and vitiated the whole transaction and all things done thereunder, so that not alone is the note for $500 not valid and enforcible against defendant, but because of the fraud related the other two notes given under the composition deed and unpaid for $175.76 each are tainted and corrupted by the fraud and are also fraudulent (*Hanover National Bank* v. *Blake*, 49 N. Y. St. Repr. 433), so that the trial justice erred when he directed a verdict for the plaintiff. Upon the testimony herein, it was his duty to have directed a verdict for the defendant. It being apparent, even from plaintiff's testimony, that it cannot hope to recover a judgment herein, a new trial would be useless.

The judgment appealed from is vacated and judgment absolute for defendant ordered, with costs.

Van Wyck, J., concurs.

Judgment for plaintiff vacated and judgment absolute for defendant.

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In re Estate of Richardson, Deceased.

(Surrogate's Court—Westchester County, February, 1893.)

The widow of R., the sole surviving executrix and trustee of his will, prior to her death loaned to one T. C. R. $3,100 belonging to the estate, and in addition placed in his hands for investment other moneys belonging thereto. By consent he was thereafter appointed "substituted trustee." On accounting, *held*, that her estate was liable for any profits earned by those sums prior to her death, and in respect thereto the substituted trustee could not be treated as an executor *de son tort*.

Held, also, that the accounting party properly omitted to charge himself with the amounts of certain policies of insurance on the lives of debtors to the estate and still running, and with the amount of the interest of the estate in a fund in liquidation, and with certain collaterals to loans made to himself, as they were not cash in hand or its equivalent. He should have set them forth, however, in his account, as he can be called upon to render a further account thereof when realized on.

Held, also, that he should be charged with whatever profits he has realized from the use of the money he borrowed from the estate, or any bonus he may have received for the loan of the fund. If, however, he realized less than legal interest, he must be charged with the deficiency.

Held, also, that if T. C. R. is to be regarded as an executor and trustee, his acts and dealings with the estate from the date of the death of the widow and prior to his appointment as a mere common-law trustee, are reviewable by the surrogate like those of an executor *de son tort*, the order appointing him relating back to the time when he assumed control of the funds.

Held, also, that commissions cannot be taken prior to an accounting.

Held, also, that an executor should keep his own accounts, and if he cannot, then he should pay for the work belonging to him to do, out of his own pocket.

Held, also, that after a referee to pass upon an executor's accounts has filed his report he cannot make an additional finding.

The testator had a large estate, of which a portion was in Great Britain and Ireland and a portion in America. By his will he appointed executors and trustees in each country, who were respectively to administer the several portions of the estate. The will was admitted to probate in this country in 1865, and the widow, who was appointed an executrix and trustee, together with the other persons as executors, etc., became the sole survivor prior to 1890. The American portion of the estate had been mostly administered during her

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lifetime. She died January 29, 1890. In 1887 she loaned to T. C. Richardson $3,100, and immediately before her death she placed in his hands $9,010.14. From that time down to June 6, 1890, he employed the fund in his hands in various ways, and on the last named day he was, by consent of all parties in interest, and by an order duly entered, appointed what is termed "substituted trustee." He held life insurance policies on the lives of debtors to the deceased, and has paid the premiums thereon. The estate is also interested in a fund held in liquidation by the Farmers' Loan and Trust Company. He also took funds of the estate to use, and placed in lieu certain collaterals belonging to himself.

In 1888 all the parties then interested in the estate and the executrix entered into an agreement to submit the accounts of the executors to Anthony A. Hurst, Esq.; that the account to be stated by him should be filed in this court and be "confirmed absolutely by the surrogate;" the decision by the referee to be final, and no appeal to be taken therefrom. His report bears date September 29, 1892, and was filed in the surrogate's office October 3, 1892, but the account is brought down only to January 29, 1890, the date of the death of Mrs. Richardson. By that report it appears that the balance of the estate was found to be $37,603.84, but it also appears that of this sum only $18,110.14 was in hand, the remainder having been paid in unequal sums to the three children on account of their respective legacies.

After the referee or arbitrator had made his report or award, he made, on the *ex parte* statement of one of the parties, an additional finding relating to a fund held in trust for the benefit of Anna P. R. Kirkland, one of the legatees.

W. H. Sloan and *F. X. Donoghue*, for trustee.

S. E. Duffey, for Edward C. Richardson, legatee.

Clarke & Culver, for Anna P. R. Kirkland, legatee and petitioner.

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COFFIN, S. It appears to be conceded that the starting point on this accounting is January 29, 1890, the date to which the referee brought it down. The sums of $3,100 (call loan) and $9,010.14 were placed in the hands of T. C. Richardson by the executrix prior to her death, and her estate is, therefore, liable for any profits earned by those sums prior to that event. In respect thereto this trustee or executor cannot be treated as an executor *de son tort*. 2 R. S. 81, § 60. The present executor is here called "substituted trustee," but in the order appointing him he is also styled "executor." It does not seem that there is any trust created by the will now unexecuted, but paying over the fund, except, perhaps, as to a portion of Mrs. Kirkland's share.

It is objected that the accounting party should have charged himself with the amounts of the life insurance policies now held by him and still running, with the amount of the interest of the estate in the fund held in liquidation by the Farmers' Loan and Trust Company, and with certain collaterals to loans made to himself. As they were not cash in hand, or its equivalent, he properly omitted so to charge himself, but he should have set them forth in Schedule G. When he realizes on them, he may be called upon to render a further account.

The present trustee had no right to borrow money from himself as such to speculate with, and whatever profits he may have realized from the use of the money belongs to the estate, and he should be charged therewith. Any bonus he may have received for the loan of the fund also belongs to the estate. Of course, if he realized, in his speculations, less than the legal interest, he must be charged with the deficiency.

If T. C. Richardson is to be regarded simply as an executor and trustee, then it would seem his acts and dealings with the estate, from the date of the death of his mother and prior to his appointment, as a mere common-law trustee, are reviewable here, like those of an executor *de son tort*, the order appointing him relating back to the time when he assumed control of the funds. While this may seem somewhat doubtful, still, in view of the fact that surrogates now possess as

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great powers on the accounting of trustees as of executors, it appears to be analogous in principle to the cases of *Matter of Faulkner*, 7 Hill, 181; *Furrell's Estate*, Tucker, 110. If, therefore, claims exist in his favor or against him, for any dealings with the estate prior to June 6, 1890, and subsequent to January 29, 1890, redress may properly be sought here.

The credit for "fee paid to T. Chesley Richardson, as trustee, $100," presumably on account of his commissions, is disallowed, as it is well settled that the commissions cannot be taken prior to the accounting.

The items of credit claimed for payment of services of bookkeepers, should be and are disallowed. Doubtless the gentlemen who rendered the services were abundantly competent experts, and were entitled to be adequately rewarded, but as a rule an executor should keep his own accounts when they are as simple as they should have been in this instance, if the executor had not rendered them more complex by his unwarranted dealings with the fund, and if he cannot, then he should pay for the work belonging to him to do, out of his own pocket.

The *addendum* to the report or award of the referee, or arbitrator, having been made subsequent to its submission must be disregarded.

With the exception of the criticisms and their results, as above outlined, the account is approved and a decree will be prepared accordingly.

In re Estate of Govan, Deceased.

(Surrogate's Court — Westchester County, February, 1893.)

The amount of the penalty of an administrator's bond is fixed not with regard to the debts the intestate owed, but the value of his personal estate.

The deceased died in the city of Hartford, in the state of Connecticut, leaving a last will and testament, which was there

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duly proved in the Probate Court, and Henry F. Smith and James H. Groom qualified as executors. The testator left some assets in the county of Westchester, and the executors applied for and obtained ancillary letters from the surrogate of said county. It was shown, by the petition therefor, that the value of the assets so left in said county did not exceed $100, and that he owed a debt of sixty dollars to a person in this state. Before such letters were issued, said executors filed the usual bond in the penalty of $130. Harriet Govan, of the city of Yonkers, in said county, now presents a petition in which she represents herself to be a creditor of the deceased in the sum of $240 and prays that said executors may be required to give additional sureties in a penalty of $600, or that their letters may be revoked. The executors file an answer, in which they deny the alleged indebtedness.

I. J. Beaudrias, for petitioner.

F. X. Donoghue, for executors.

COFFIN, S. This court cannot try the question of the alleged indebtedness, but must regard the claim of the petitioner, although disputed, as sufficient to entitle her to make an application of this character. Nevertheless, the prayer of her petition must be denied. She asks for a bond in a penalty of $600, the admitted debt being sixty dollars, and her claim $240, making $300, the half of the proposed penalty. She does not claim that the value of the assets in this state exceeds $100, which is the amount stated in the petition for the letters. Now, by section 2699 of the Code, before such letters can be issued, the persons to whom they are awarded, must qualify as prescribed in section 2667, to wit, by giving a bond in a penalty not less than twice the value of the personal estate of the deceased, except that the penalty of the bond may, in the discretion of the surrogate be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state. This discretionary power was exercised in this case. It would seem that unless the surrogate exercise

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this discretion the penalty of the bond should be twice the amount of the value of the assets in this state, and then, in this case, the penal sum would have been $200. It would be absurd to hold that the legislature intended that where the amount of the assets was only $100, and the amount of the debts $5,000, the executors should give a bond in the penal sum of $10,000. The amount of the penalty of an administrator's bond is fixed, not with regard to the debts the intestate owed, but the value of his personal estate. The only object of the bond here is to secure the creditors to the extent of the value of the assets.

The prayer of the petition is, therefore, denied, with ten dollars costs of the motion.

Ridgway *v.* Grace.

(New York Common Pleas — General Term, February, 1893.)

The detriment to the promisee which suffices as a consideration for a contract, must be a detriment on entering into the contract, not from the breach of it.

An oral promise by a party holding a fund as agent, to pay therefrom a debt of his principal, made without the authority of the principal, is not, without more, upheld by a sufficient consideration to support an an action by the promisee, although from reliance on the promise, he suffers injury.

Where it appears on the face of the complaint, that the promise to pay the debt of another was oral and collateral, the defense of the Statute of Frauds, is available though not pleaded.

Appeal from judgment on trial by the court. The opinion states the case.

Ira Shafer, for plaintiff (appellant).

William L. Turner, for defendants (respondents).

Pryor, J. As the case does not purport to contain all the evidence, we are confined, on this appeal, to a review of errors of law by the trial court. *Meislahn* v. *Englehard*, 1 Misc. Rep. 412.

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Stating the case in the aspect most favorable to the appellant, it is: that G. W. Smith & Co., having a judgment against J. P. O'Sullivan as drawer of an unaccepted bill of exchange, assigned the draft and judgment to the appellant; that the appellant applied to the respondents to reserve out of a fund of O'Sullivan, coming into their hands as his agents, sufficient money to pay the judgment, and they promised to so pay the judgment; that O'Sullivan never authorized them to make such promise or payment; that in consequence of such promise appellant forebore any effort otherwise to collect the judgment; that respondents received the fund on account of O'Sullivan, but instead of paying the judgment out of it, appropriated it to O'Sullivan himself and to the satisfaction of their own claims against him. The question is, whether the respondents by their neglect to pay appellant's judgment, violated his legal right? Or more directly, was respondents' promise to pay the judgment of any legal force or effect?

That to the existence of a valid contract a consideration is indispensable, is an elementary principle, and equally elementary in our law is the other proposition, that a moral obligation, not surviving an extinct legal duty, is not such a consideration as will support an assumpsit. A consideration is a thing of some benefit or legal possibility of benefit to the promisor, or a thing of some prejudice or legal possibility of prejudice to the promisee. Now, it is obvious beyond the chance of mistake, that neither the engagement to pay the judgment nor its actual payment by the respondents, could be of any possible benefit to them. It is answered, however, that the neglect of the appellant to pursue the judgment debtor in reliance on the promise of the respondents, was such a detriment to him as constituted a legal consideration for their promise. Assuming that because of such reliance appellant miscarried in the collection of the judgment, and still no legal consideration is apparent to uphold the promise of the respondents. For the prejudice which avails as a competent consideration for a promise "must be a prejudice *on entering*

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into the contract, not a prejudice *from the breach of it.*" Broom's Comm. on the Common Law (3d ed.), 315, 316; *Gerhard* v. *Bates*, 2 Ellis & Black, 487, 488; *Crowther* v. *Ferry*, 15 Q. B. 677, 680. It is clear that, since in accepting the promise of the respondents the appellant did not engage to abstain from any effort or to forego any means to collect the judgment, he incurred no detriment on entering into the agreement, and that whatever inconvenience or injury he has suffered, ensued only from a breach of the agreement. Manifestly, the violation of a gratuitous promise may result in the ruin of the promisee relying on it, *e. g.*, to take up the note of a friend; and yet, though great the disappointment and disastrous the consequence to the promisee, he can assert no right of action for the breach of such an engagement. This, upon appellant's testimony, is precisely the case at bar. Relying, as he says, on the voluntary promise of the respondents, he relinquishes all effort to collect his judgment and, in consequence, it is an irretrievable loss to him, and yet he has to blame, not any erroneous conception of the law by the trial court, but only his own misplaced confidence. We may compassionate, but cannot redress his grievance.

As already stated, the argument proceeds on a concession of the facts as claimed by the appellant; but it is due to the respondents to add that the learned trial judge finds their promise, in legal effect, conditional on the consent of O'Sullivan, which was never given, and that the evidence justified the inference that Mr. Grace himself made no promise nor knew of any on his behalf.

It being clear beyond question that the promise at the bottom of this action was a mere gratuitous undertaking, of no legal force or effect, the judgment for the respondents was the necessary conclusion of law.

We are of the opinion, furthermore, that the action cannot be maintained, because founded on an oral promise to pay the debt of another. The argument of Rapallo, J., in *Ackley* v. *Parmenter*, 98 N. Y. 425, 433, completely covers the case and shows to demonstration that the Statute of Frauds is a

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defense to the action. If it be objected that the statute is not pleaded, we answer that it is apparent on the complaint that the promise was oral and collateral, and so the defense is available, though not pleaded. *Porter* v. *Wormser*, 94 N. Y. 431, 450; *Wells* v. *Monihan*, 129 id. 161.

The plea of the Statute of Limitations presents a more difficult and doubtful question; but, since the action fails for other fundamental defects, we are dispensed from the consideration of this defense.

The claim that Smith & Co. assigned to appellant an interest in the fund in the hands of the respondents is invalid, because Smith & Co. did not pretend to assign any such interest and because they had no such interest to assign.

The ground upon which the learned trial judge placed his decision may also be fatal to the appeal, namely, that it being the duty of the respondents to pay the money over to their principal, O'Sullivan, any engagement between them and the appellant in fraud and defeat of that duty, would be an illegal contract, and so not enforceable.

Judgment affirmed, with costs.

DALY, Ch. J., and BOOKSTAVER, J., concur.

Judgment affirmed.

WRIGHT *v.* DEERING.

(New York Common Pleas—General Term, February, 1893.)

A complaint on a note must allege nonpayment; but the absence of the averment will be supplied by unchallenged proof of the fact.

APPEAL from judgment of the General Term of the City Court affirming judgment on direction of a verdict. The opinion states the case.

James A. Deering, for defendant (appellant).

James Taylor, for plaintiff (respondent).

PRYOR, J. Action on promissory notes by indorsee against maker. The complaint sets out the notes, alleges the making

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of them by the defendant, their transfer to the plaintiff and his ownership of them; but omits an averment of nonpayment or of indebtedness upon the notes.

By motion at the trial to dismiss the complaint for defect in substance, the defendant presented the point that it was insufficient for want of an allegation of nonpayment or present indebtedness. And so it was, beyond question.

Tested by the general rule that a complaint must contain a statement of facts constituting a cause of action, the complaint under criticism was essentially defective, in omitting an averment of nonpayment. "The material allegations" in an action on a promissory note "are, the making, the transfer, and the nonpayment. Each of them is material, for without the concurrence of all, the complaint would not show a cause of action." *Van Giesen* v. *Van Giesen*, 10 N. Y. 316, 317; *Lent* v. *R. R. Co.*, 42 N. Y. St. Repr. 592, 595 (Court of Appeals); *Witherhead* v. *Allen*, 4 Abb. Ct. App. Dec. 628. Tested by the special rule in section 534 of the Code, the complaint is bad for not alleging an indebtedness on the notes. *Broome* v. *Taylor*, 76 N. Y. 564, 566; *Lent* v. *New York, etc., R. Co.*, 44 N. Y. St. Repr. 596.

As there is nothing in the answer to repair the defect in the complaint, we are to inquire if, upon the unchallenged proof, a cause of action appears.

By evidence without objection and uncontroverted, it is shown that repeated demands were made for payment of the notes, to which, on one occasion, the defendant responded by an offer of "new notes." This, in the absence of denial or explanation, was sufficient proof of nonpayment; and the defect in pleading being supplied by the evidence, we are not at liberty to review the refusal to dismiss the complaint. *Lounsbury* v. *Purdy*, 18 N. Y. 515.

Judgment affirmed, with costs.

Bookstaver and Bischoff, JJ., concur.

Judgment affirmed.

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KUMMER *v.* CHRISTOPHER AND TENTH ST. R. CO.

(New York Common Pleas—General Term, February, 1898.)

It is the right and duty of the General Term, on appeal from an order denying a new trial, to reverse the order when in its opinion upon the evidence, the case of the respondent is a fabrication.

APPEAL from judgment on a verdict, and from order denying a new trial. The opinion states the case.

Merrill & Rogers, for defendant (appellant).

Herbert T. Ketcham, for plaintiff (respondent).

PRYOR, J. On appeal from an order denying a motion for a new trial it is the right, and for that matter the duty too, of the court at General Term to review the evidence and to set aside the verdict if believed to be unsustained by credible proof and contrary to the justice of the case. *Hamilton* v. *Third Ave. R. Co.*, 53 N. Y. 25, 30; *Hynes* v. *McDermott*, 7 Abb. N. C. 98; *Engel* v. *Schoolherr*, 12 Daly, 417. Otherwise there would be no relief from a judgment unaffected by legal error, though resting upon a verdict itself infirm from a defect of evidence satisfactory to the reason and conscience of the court. And, in view of the prevalent disposition of juries in cases of personal injury to award damages against corporations upon slight or equivocal evidence, we conceive it an imperative duty not to relax that supervision of their determinations which the law exacts of us in the interest of public justice.

The case before us is an instructive illustration at once of this reckless inclination on the part of juries, and of the necessity of the corrective power in the appellate tribunal.

Here is a judgment of $3,000 against the defendant corporation, and upon what evidence?

Two witnesses appeared for the plaintiff, he and his son. The plaintiff testified: "Then he (the conductor) came back again and took me behind here, and threw me down behind the car; before he did that, he wanted me to pay the fare; I

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had the five cents in my hand and wanted to hand the five cents, and he would not take it; then he threw me down behind the car; I was standing on the platform crowded with passengers, and after the car had stopped, the conductor came around and asked me for my fare, and when I offered it to him, without saying a word, he picked me up, lifted me out from the passengers in front of my son, and threw me on the street; my son did not try to do anything; there was nobody standing between me and my son; there were other people on the platform; I did not see anybody offer to pay his fare except myself at the time the driver threw me off; as far as I saw I was the only person who offered to pay the fare, and yet I was the only person the driver assaulted; I did not say anything to the driver except to pay my fare; he did not say anything to me except to ask me to pay the fare; there had been no hard words between us." The son testified: "He said ain't you going to pay your fare? With that my father says, 'I will pay my fare;' he pulled out five cents, which he had in his hand; so he caught hold of my father and threw him across the rail of the track; the only person who offered to pay his fare was the person whom the driver picked up and threw on the street; none of the passengers gave me their card or their names; my father did not cry out; I did not cry out."

Upon this story no motive whatsoever is apparent for the alleged assault by the driver. The fare was offered; why was it rejected, and the plaintiff assaulted? And why should this old man alone, of the many who refused or failed to pay their fare, be selected for ejection from the car? There had been no hard words between him and the driver; against him the driver had no cause of complaint; why then should he be assaulted without pretense of provocation, while the offending others were let go with impunity? Then, too, neither the plaintiff nor his son made any outcry, but submitted to the outrage in silence. Nor did they appeal to the passengers to bear witness to the wrong; nor did the son, twenty-four years old, or any passenger offer to defend or to succor this outraged old man. The story is contrary to all probability; it is

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incredible. But still further to discredit it, if possible, it was shown without contradiction that to the ambulance surgeon who was called to take the plaintiff to the hospital, he said "he had fallen and hurt his hip. I asked him several times subsequently and he said he had fallen from the car. The plaintiff did not at any time, either then or while in the hospital, state to me that the driver or anybody had thrown him off from the car. He said he had fallen on his hip. He did not say at all, except he had fallen from the car on his hip." The driver of the ambulance corroborates the surgeon and adds: "I heard him say in the hospital the same thing; he fell off the car, and he never said in any way to me or in my presence, that anybody threw him off the car." These, be it remarked, are absolutely disinterested witnesses, the only disinterested witnesses in the case. They were not contradicted by the plaintiff, nor did he offer any explanation of his statements that he had fallen from the car, or of his omission to say that he had been thrown off. It is to be borne in mind too, that not till the commencement of this action, after an interval of five months, does it appear that the plaintiff ever claimed to have been thrown from the car.

Here, then, we have a story which in itself baffles belief, which is supported only by persons with the profoundest interest in the litigation, and which is discredited by the plaintiff's own contradictory statements when he was exempt from the influence of a suit for damages.

We are not unmindful that the credibility of a witness is peculiarly for determination by the jury; but this is in case of conflicting testimonies, when to decide between the respective claims to credence significance is attached to the demeanor of the witness on the stand. *Chaffee* v. *Morse*, 67 Barb. 252. Here is no conflict between competing testimonies nor comparison of the bearing of opposing witnesses, but simply a question of the credence due to a story in itself improbable, and discredited, not only by the contrary statements of the witness, but by all the conceded circumstances of the case. Whether a statement be in itself incredible, and whether and how far it

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is exploded by the contradictory admissions of the witness, are problems which we are as competent to solve as the jury who tried the case. The question is not as to the credibility of the witnesses but as to the credibility of the story.

The burden of proof was upon the plaintiff. A mere scintilla of evidence was not enough to establish his case, but he was bound to produce proof sufficient "to reasonably satisfy the jury" and upon which they could "properly proceed to find a verdict." *Dwight* v. *Germania Ins. Co.*, 103 N. Y. 341, 359.

Upon the evidence, our undoubting conviction is, that the plaintiff's case was a fabrication, and that the verdict is against truth and justice.

Judgment and order reversed, and a new trial directed, costs to abide the event.

Bookstaver and Bischoff, JJ., concur.

Judgment and order reversed and new trial granted.

Compton *v.* Mellis.

(New York Common Pleas—General Term, February, 1893.)

When, after a contract for the sale of personalty, the seller, buyer and a third person agree that the latter shall become the purchaser instead of the original buyer, such substituted agreement is not within the Statute of Frauds as an engagement for the debt of another.

Appeal from judgment of the General Term of the City Court affirming judgment on verdict. The opinion states the case.

Abram Kling, for defendant (appellant).

Hyland & Zabriskie, for plaintiff (respondent).

Pryor, J. We are asked to reverse the judgment because, as contended, the Statute of Frauds is fatal to the recovery; but how, upon the pleadings, can we give effect to the defense? The action is for goods sold and delivered, the answer a denial

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only; and thus, the defense being neither pleaded nor apparent on the complaint, is unavailable. *Wells* v. *Monihan*, 129 N. Y. 161; *Porter* v. *Wormser*, 94 id. 431; *Crane* v. *Powell*, 46 N. Y. St. Repr. 668. Nevertheless, the benefit of it was accorded to the appellant on the trial, and his defeat was due only to his failure to establish it. Out of abundant indulgence to him, we have examined the record to ascertain if any error of law vitiates the verdict.

The evidence was sufficient to show that the merchandise in question was sold and delivered to the Carr and Hobson Company; that the vendor, informed of the insolvency of the company, threatened to replevy the goods for fraud in the purchase; that thereupon the sale to the company was rescinded and the goods sold afresh to the defendant. By his charge, the learned trial judge presented the case to the jury upon the hypothesis of this predicament of fact, instructing them expressly that unless they found that, with the consent of the company, the appellant made a new contract for the purchase of the goods himself, he would not be responsible. So directed, the jury must have found that the appellant became a substituted buyer, instead of the original vendee, who was discharged from his obligation; and this being the case, the engagement of the appellant was primary and absolute, not secondary and contingent. A contract of novation is not within the Statute of Frauds. *Coe* v. *Weller*, 6 Thomp. & C. 309. The authorities adduced by the appellant are inapplicable to the facts as found by the jury; and the exceptions are tenable only upon a theory of the case not submitted to their determination.

As the appeal is from the City Court and the case does not purport to present all the evidence, we are precluded by a double difficulty from canvassing the evidence in support of the verdict.

Judgment affirmed, with costs.

Daly, Ch. J., and Bischoff, J., concur.

Judgment affirmed.

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WILLARD *v.* HOLMES, BOOTH & HAYDENS.

(New York Common Pleas—General Term, February, 1893.)

Plaintiff, for many years defendant's treasurer and manager, authorized to use its name for the indorsement of commercial paper, and having the general conduct of its business affairs, in accordance with defendant's constant practice and with the knowledge of its board of directors, indorsed defendant's name upon the note of a corporation customer of defendants. While such note was outstanding and unpaid, plaintiff resigned as treasurer and manager. His successor, W., ascertaining the fact of defendant's liability as indorser of said note, instructed counsel to prosecute plaintiff for damages for the alleged unauthorized use of defendant's name. Thereafter, in an interview, plaintiff fully explained to W., in detail, all the circumstances attending his indorsement of said note and also repeated the explanation in W.'s presence at a subsequent meeting of defendant's board of directors which he attended at W.'s request. Plaintiff declining to secure defendant against its contingent liability on the note, by a conveyance of his property, the board of directors authorized W. to proceed with the action against plaintiff and to attach his property, he being a nonresident of the state, which was done. Plaintiff in that suit had judgment on the ground that he was authorized to indorse the note and the Court of Appeals affirmed the same. In an action for malicious prosecution, *held*, that the action against plaintiff, and the attachment of his property was without probable cause and malicious.

Advice of counsel is no defense to an action for malicious prosecution where it does not appear that the advice was obtained after a full, fair and honest statement of all the facts.

Plaintiff had a verdict for $31,700. *Held*, that as the record did not show that the jury were actuated other than from conscientious motives and a proper discharge of duty, or that their deliberation was warped by undue sympathy for plaintiff, passion or prejudice against defendant, their estimate of plaintiff's damages was conclusive.

APPEAL by defendant from a judgment for plaintiff which was entered upon the verdict of a jury, and from an order denying defendant's motion for a new trial on the several grounds specified in section 999 of the Code of Civil Procedure.

Action by Samuel H. Willard against defendants to recover damages for the malicious institution and prosecution of an action charging plaintiff with having, while treasurer and manager of the defendant corporation, wrongfully used its name for the indorsement of the promissory note of another

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corporation, and for causing his property to be attached in that action.

Marshall P. Stafford for plaintiff (respondent).

William H. Harris, Edward M. Shepard and *John E. Parsons* for defendant (appellant).

BISCHOFF, J. Whatever the doubt in which the question was at one time involved, it is now well settled that a private corporation is liable *civilter* for malicious prosecution (*Morton* v. *Met. L. Ins. Co.*, 34 Hun, 366; 103 N. Y. 645; *Nat. Bank* v. *Graham*, 100 U. S. 699; *Denver, etc., R. R. Co.* v. *Harris*, 122 id. 597; *Williams* v. *Planter, etc., Co.*, 34 Am. Rep. 494; *Carter* v. *Howe Machine Co.*, id. 311; *Wheless* v. *Second Natl. Bank*, 25 id. 783; *Reed* v. *Home Savings Bank*, 39 id. 468; *Gulf, etc., R. R. Co.* v. *James*, 15 Am. St. Rep. 743; *Hussey* v. *Norfolk, etc., R. R. Co.*, 2 id. 312; *Jordan* v. *Alabama, etc., R. R. Co.*, 49 Am. Rep. 800), and the malice of its officers and employees, or other agents, accompanying the performance of acts within, or incidental to the discharge of their duties, is imputable to the corporation (*Gulf, etc., R. R. Co.* v. *James*, 15 Am. St. Rep. 743; *Evansville, etc., R. R. Co.* v. *McKee*, 50 Am. Rep. 103), unless those acts were intended as a mere cover for the accomplishment of some independent and wrongful purpose. *Hoffman* v. *New York Central, etc., R. Co.*, 87 N. Y. 25; *Kolzem* v. *Broadway & Seventh Ave. R. R. Co.*, 20 N. Y. Supp. 700; 1 Misc. Rep. 148; *Donivan* v. *Manhattan Railway Co.*, Id. 368.

Liability, it seems, is predicable of the malicious prosecution, without probable cause of an ordinary civil action (*Pangburn* v. *Bull*, 1 Wend. 345; *Eastin* v. *Bank of Stockton*, 56 Am. Rep. 77; *Closson* v. *Staples*, 1 id. 316; *Whipple* v. *Fuller*, 11 Conn. 582; *Lockenour* v. *Sides*, 26 Am. Rep. 58; *McCardle* v. *McGinley*, 44 id. 343), and unquestionably so if the prosecution of the action be accompanied by the arrest of the person prosecuted, or the seizure and detention

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of his property. Cooley on Torts (2d ed.), 217; Newell on Malicious Prosecution, etc., chap. 1, § 26, p. 35, and cases cited.

To maintain an action for malicious prosecution, plaintiff must establish that the prosecution has terminated in his favor, that it was unfounded and without probable cause, and that the prosecutor was actuated by malice. *Wheeler* v. *Nesbit*, 24 How. (U. S.) 544; *Besson* v. *Southard*, 10 N. Y. 236; *Heyne* v. *Blair*, 62 id. 19; *Thaule* v. *Krekeler*, 81 id. 428; *Anderson* v. *How*, 116 id. 336; *Foshay* v. *Ferguson*, 2 Denio, 617.

The termination of the alleged malicious prosecution is sufficiently shown if it appears that no further proceeding can be taken therein (*Robbins* v. *Robbins*, 133 N. Y. 597); "probable cause" is defined to be "a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that a person accused is guilty of the offense with which he is charged" (*Anderson* v. *How*, 116 N. Y. 336; *Carl* v. *Ayers*, 53 id. 14; *Foshay* v. *Ferguson*, 2 Denio, 617), a concurrence of real belief and reasonable grounds for it (*Farnam* v. *Feeley*, 56 N. Y. 451; *Shaul* v. *Brown*, 4 Am. Rep. 151), and "malice" in law comprehends not only, as in the ordinary meaning of the term, a malevolent intention to injure another in his person, property or good repute, but also any wanton or reckless disregard of another's inviolable enjoyment of his civil rights. Newell on Malicious Prosecutions, etc., chap. 14, § 34, p. 524; *Kolzem* v. *Broadway & Seventh Ave. R. R. Co.*, 1 Misc. Rep. 148; *Voltz* v. *Blackmar*, 64 N. Y. 440.

Applying the consideration of "probable cause" as above defined it stands to reason that if the prosecutor knew, or ought to have known, or could with reasonable diligence and caution have ascertained facts exculpating and exonerating the person accused or suspected, he cannot successfully urge that there was "probable cause for prosecution." *Fagnan* v. *Knox*, 66 N. Y. 525; *Wass* v. *Stephens*, 128 id. 123. Whether there was, or was not "probable cause" is, if the evidence is not conflicting, or conflicting inference cannot be

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reasonably drawn therefrom, a question of law to be determined by the court, otherwise it is for the jury (*Bulkeley* v. *Keteltas*, 6 N. Y. 384; *Besson* v. *Southard*, 10 id. 236; *Burns* v. *Erben*, 40 id. 463; *Heyne* v. *Blair*, 62 id. 19; *Thaule* v. *Krekeler*, 81 id. 428; *Anderson* v. *How*, 116 id. 336; *Hazzard* v. *Flury*, 120 id. 223); and while "malice" is not predicable wholly of the want of "probable cause" it may nevertheless be inferable from the same facts which establish the latter. *Wheeler* v. *Nesbitt*, 24 How. (U. S.) 544; *Thompson* v. *Lumley*, 50 How. Pr. 105; 3 Lawson's Rights, Remedies & Practice, 1890, § 1098.

Now, what are the facts in the case at the bar? Defendant is a corporation chartered "for the purpose of manufacturing and dealing in all kinds of brass, copper and German silver goods, plated ware and metals, composed wholly or in part of copper, brass or German silver, and all articles composed, in whole or in part, of metal which it shall deem expedient, and to do such other things as are incident to the prosecution of said business, and to exercise such mercantile powers as may be convenient and necessary for the successful prosecution of said business." One of the articles of defendant's manufacture was a metal lamp, in connection with the use of which carbon was required, and for the supply of carbon it had contracted with the Forest City Carbon Manufacturing Company. Plaintiff had been for many years defendant's treasurer and manager, was authorized to use its name for the indorsement of commercial paper, and to him had been intrusted the general conduct of its business affairs. It had been defendant's constant practice, to the knowledge of its board of directors and stockholders, through its treasurer and manager and at his discretion, to extend financial assistance to such persons or corporations as had established business affiliations with it, when required. In July, 1886, the Forest City Carbon Manufacturing Company, which for more than a year had supplied defendant with carbon, desiring to extend its works and to comply with defendant's request for increased supplies, requested defendant, through its treasurer manager, plaintiff,

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for a loan of $10,000, which the latter granted by indorsing the carbon company's note with defendant's name, causing it thus to be discounted, and remitted the proceeds to the maker. In the latter part of the year 1886, and while the carbon company's note, indorsed as mentioned, was still outstanding and unpaid, plaintiff resigned as defendant's treasurer and manager. Chandler N. Wayland, who had been previously elected president, was thereupon also elected treasurer and appointed manager in plaintiff's stead, and assumed the management and control of defendant's business. The newly-elected president, treasurer and manager ascertained the fact of defendant's outstanding liability as indorser of the carbon company's note, at once applied to counsel and instructed him to commence suit against plaintiff to recover damages for the alleged unauthorized use of defendant's name. Acting upon these instructions, counsel prepared the required summons and complaint for an action in the Supreme Court as well as the papers necessary to obtain an attachment against plaintiff's property, he being a nonresident of the state, but, at Wayland's request, withheld service thereof to await his further direction in the premises. Thereafter Wayland had an interview with plaintiff, at which the latter fully explained to the former in detail all the circumstances attending his indorsement of the carbon company's note. This explanation was repeated by plaintiff in Wayland's presence at a subsequent meeting of defendant's board of directors, which he attended at Wayland's request, and at which there was also present a director, George W. McGill, himself a stockholder of the carbon company, and who had advised the making of and prepared the contract under which the carbon company was supplying defendant with carbon. McGill, on the trial of this action, confessed that at the time of this meeting he was cognizant of the purposes for which plaintiff had indorsed the carbon company's note, and of the fact that plaintiff had indorsed it in the utmost good faith and without wrongful motive or intent, but that he refrained from protesting against plaintiff's prosecution lest his motives for so doing

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might be impugned. Heedless of plaintiff's explanation, regardless of the fact that he had indorsed the carbon company's note in the furtherance of defendant's business, pursuant to authority given him, and seemingly solicitous only that he should secure defendant against its contingent liability by a conveyance of his property, which he, protesting his innocence, declined to do, defendant's board of directors authorized Wayland to proceed with plaintiff's contemplated prosecution, and Wayland thereupon, and without further submission to counsel of the facts transpiring at the directors' meeting, advised counsel by telegraph to proceed with the Supreme Court action and to attach plaintiff's property upon the complaint and papers previously prepared, which was accordingly done. Plaintiff defended and the trial resulted in a judgment in his favor, establishing his claim of authority to indorse the carbon company's note and the truth of his assertions at the directors' meeting. This judgment was affirmed at General Term (*Holmes, Booth & Haydens* v. *Willard*, 24 N. Y. St. Repr. 260) and by the Court of Appeals (125 N. Y. 75).

True, the Supreme Court and the Court of Appeals differed concerning the legal deductions authorized by the facts, the former maintaining that the loan of money to its customers was not *ultra vires* on the part of defendant, and the latter tribunal determining that it was so in the instance of the loan to the carbon company, because it did not appear that the sale of carbon was within defendant's corporate authority. The facts established on the trial, however, remained undisturbed, and the result reached by each of the appellate tribunals was the same — that plaintiff had authority to indorse the carbon company's note, from defendant's directors expressly, and from its stockholders by acquiescence and acceptance of the benefits accruing from the sale of carbon, which precluded them from asserting the want of authority, and that plaintiff was not answerable to defendant.

The facts determined in the Supreme Court action and proved on the trial of this action, thus conclusively established

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that plaintiff was prosecuted not only without cause, but also without "probable cause," since it would imply stultification by defendant to urge that it did not know what authority it had given plaintiff. Defendant's president, treasurer, manager and board of directors had, by plaintiff, been fully informed, prior to the institution of the action against him, why and for what purposes he had indorsed the carbon company's note, and defendant became thereupon chargeable with knowledge of the fact of plaintiff's authority in the premises. *Wass* v. *Stephens*, 128 N. Y. 123.

Was the prosecution malicious? The affirmative solution of this query must inevitably follow if we are correct in the proposition that defendant was chargeable with knowledge of plaintiff's authority to indorse the carbon's company's note. It is incomprehensible how defendant, after having authorized plaintiff to indorse the note, could yet successfully contend that its known and persistent prosecution of the plaintiff for a series of years upon an accusation of having wrongfully incurred liability as indorser on its behalf was aught but a wanton and reckless disregard of his right to the enjoyment of property and good repute and in that sense, at least, "malicious."

Defendant sought to shield itself in this action by the "advice of counsel." "Advice of counsel" is, however, only a defense in so far as it may tend to prove "probable cause" and disprove "malice" (*Gulf, etc., Railway Co.* v. *James*, 15 Am. St. Rep. 743), and to have this effect it should appear that the "advice of counsel" was obtained after a "full, fair and honest" statement of all the facts concerning the guilt of the person suspected or accused which have come to the prosecutor's knowledge. Newell on Malicious Prosecution, etc., chap. 8, § 2 *et seq.*, p. 310, and cases cited in the text and notes; *Ames* v. *Rathburn*, 37 How. Pr. 289. This does not appear to have been done in the case now under consideration, for though we assume Wayland's belief of plaintiff's guilt to be attributable only to the want of sufficient information of the facts when he first sought counsel and directed the

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preparation of papers for the purposes of the Supreme Court action and the attachment of plaintiff's property therein, the facts transpiring at the subsequent interview between plaintiff and Wayland, and at the directors' meeting were not so submitted and *non constat* but that if they had been, counsel's advice would have been in accord with the subsequent decisions of the Supreme Court and Court of Appeals. But had Wayland and other officers of the defendant, who were instrumental in the prosecution of the Supreme Court action, testified to the "advice of counsel" on such subsequently ascertained facts, their credibility as interested witnesses, chargeable with the consequences of that prosecution, would have been a matter for the jury's determination. *Canajoharie Nat. Bank* v. *Diefendorf*, 123 N. Y. 191.

We have refrained from specially noticing the denial of defendant's motion for dismissal of the complaint when plaintiff rested because any defect in the proof at that time existing was cured by evidence subsequently adduced by the parties (*Schenectady & Saratoga Plank Road Co.* v. *Thatcher*, 11 N. Y. 102, 113; *Tiffany* v. *St. John*, 65 id. 315, 317; *Painton* v. *Northern Cent. R. R. Co.*, 83 id. 7), and upon the whole case our conclusion is that the trial judge properly refused to dismiss the complaint and to direct a verdict for defendant.

The verdict awarded plaintiff $31,700 for damages which had resulted to him from the malicious prosecution complained of in this action, and though but $2,500, the expenses incurred for counsel fees in his defense, was shown to have been plaintiff's actual pecuniary loss, we cannot upon mature consideration reach the conclusion that interference on our part with the verdict, only because it is of a large amount, would be justifiable. The evidence shows, and this fact was conceded by some of defendant's witnesses, that up to the time of defendant's unwarranted accusation plaintiff's integrity was unimpeached. It also appeared that he rated high in financial and mercantile circles, and had been solicited to assume the presidency of a banking institution,

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besides holding equally important and fiduciary positions in several manufacturing corporations. The loss of these offices was directly attributable to defendant's prosecution of what has proved to be an unwarranted impungment of plaintiff's integrity. In arriving at the amount awarded, the jury justly considered the loss of the offices mentioned, the actual expense incurred by plaintiff in his vindication, any general impairment of his integrity in social and mercantile aspect, and the shame and humiliation endured as a direct result of the publicity of his arraignment upon a charge injuriously affecting his trustworthiness, which emanating as it did from a corporation of defendant's importance carried with it almost the imprint of truth. We know not how the extent of plaintiff's loss may be even approximately ascertained and stated in a pecuniary sense, and since the record does not show that the jury were actuated other than from conscientious motives and a proper discharge of duty, or that their deliberation was warped by undue sympathy for the plaintiff, passion or prejudice against the defendant, we are forced to regard their estimate as conclusive. "I should be sorry," said Lord MANSFIELD in *Gilbert* v. *Burtenshaw*, 1 Cowp. 230, "to say that in cases of personal torts no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality or prejudice. But it is not to be done without very strong grounds, indeed, and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel that, if they had been on the jury, they would have given less damages, or where they might think the jury themselves would have completely discharged their duty in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion than such a case as this, and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line;" so in *Whipple* v. *Cumberland Manufacturing Co.*, 2 Story, 661, it is said by Mr. Justice STORY that a verdict should not be set aside as excessive in cases of tort "unless the court can

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clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated;" and by Mr. Justice MATTHEWS in *Barry* v. *Edmunds*, 116 U. S. 550;—S. C. Rep. 550, that "in no case is it permissible for the court to substitute itself for the jury and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury is the appointed constitutional tribunal to award."

We perceive no error in the rulings of the learned trial judge, and the judgment and order appealed from should be affirmed with costs.

DALY, Ch. J., and PRYOR, J., concur.
Judgment and order affirmed.

FRENCH *v.* VIX.

(New York Common Pleas—General Term, February, 1898.)

Defendants V., contractors for the erection of a building, agreed to become answerable for any damages to the property or person of any neighbor during the performance of the work. A subcontractor to blast rock and excavate earth assumed all responsibility for any loss or damage which might occur to person or property while he or his employees were engaged in the performance of such work, and agreed to save the contractors harmless from the payment of any such loss. Eighteen holes were drilled for blasting purposes, and when the blast was let off, considerable damage was thereby occasioned to plaintiff's building. Further damage was done to plaintiff's property by a continuance of the blasting. In an action against the contractors and subcontractor to recover damages, the complaint alleged that the damage was done by reason of the negligent manner in which the rock was blasted. The trial court withdrew the question of negligence from the jury and held the defendant contractors were liable under their contract with the owner, without any proof of negligence. *Held*, error; that the work of blasting not being dangerous in itself, and the damage arising therefrom being the result of the negligent manner in which the work was performed by the subcontractor, who had exclusive control thereof, the contractors were not liable

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ARGUMENT of exceptions directed to be heard in the first instance at the General Term.

Deyo, Duer & Bauerdorf (*Robert E. Deyo*, of counsel), for defendants Vix.

Williams & Vanderzee (*William Henry Arnoux*, of counsel), for plaintiff.

BOOKSTAVER, J. This case was tried at trial term and resulted in a verdict in favor of the plaintiff for $2,500, whereupon the trial judge ordered the exceptions to be heard at the General Term in the first instance. On the trial, it appeared that in May, 1889, the plaintiff was the owner of a house and lot on West Sixtieth street, and that Nicholas Henry was the owner of a vacant lot immediately adjoining on the west. In that month Henry entered into a contract with the defendants Vix for the erection of a building on his lot. This contract contained, among other things, the following clause: "And the said parties of the second part (Vix) further agreed to become answerable and accountable for any damages that may be done to the property or person of any neighbor or passerby during the performance of said work." It further appeared that the surface of Henry's lot was covered with rock, and the defendants Vix made a subcontract with the defendant Dolan, a blaster, to excavate the earth and rock, which contained the following provision: "The said Dolan hereby assumes all responsibility for any loss or damage which may occur to person or property while he or his employees are engaged in the performance of such work, and hereby agrees to save the said Jacob Vix and son harmless from the payment of any such loss." Dolan commenced to work about the 25th of May, 1889, and the first blast was on the fourteenth of June in that year. In preparation for that blast, Dolan's workmen drilled a row of six holes within five feet of the wall of plaintiff's house, and two other rows, in all eighteen holes; this was done by machinery, and the holes were each eight feet deep and four feet apart, the rows being

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the same distance apart. When this blast was let off it caused the ceiling in the hall and in every room in plaintiff's house to fall; the stoop was knocked down, several stone banisters broken, the heavy newel posts separated from the stoop; the brown stone under the stoop was knocked out of place, also the iron door; four of the beams holding the basement floor were split; the heavy iron sewer pipe was broken, and other considerable damage done the building. After this the blasting continued and other injury was done to plaintiff's property. To recover for these injuries, this action was brought against the Vixes and Dolan, the complaint alleging that Dolan was the agent of the Vixes, and that the Vixes, by their contract with Henry, had agreed to become and be accountable and personally responsible for any and all damages that might or should be done to the adjoining property by reason of the prosecution of the work, and that the rock was blasted in a negligent and unlawful manner, and that by reason thereof the damage was done. The answer of the Vixes denied that Dolan was their agent, or that they had any control over, or knowledge of the manner in which the work was done, and alleged that Dolan did the work as an independent contractor. He also interposed an answer, and was present on the trial, and sworn as a witness, but took no other part in the trial of the action, and was not represented by counsel. On the trial, the court held "that the stipulation in the agreement between Henry and the Vixes, made the Vixes liable, upon the ground that they were substantially indemnitors, and that from the principle of avoiding circuity of action, a person might act at once against the person ultimately liable." The same view was taken on the motion to dismiss the complaint, when the plaintiff rested. The court also held, "that no question of negligence or nonnegligence is involved in the case;" and the jury was charged, that "in any event, you must find a verdict for the plaintiff," and "they (the Vixes) are held accountable, not because they did the injurious act, since, as I have already said, they did not do it, either themselves, or by their own authorized agent or servant; and their liability constitutes a marked exception to the ordi-

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nary rule of law, which is, that no man is responsible for an act which he did not do himself, or by some agent or servant that he has constituted to do the act. The defendants Vix, therefore, are liable, by virtue of an arbitrary rule of law, namely, having signed this stipulation, by which they agreed with Mr. Henry, the owner of the lot upon which the blasting was to be done, to be 'answerable and accountable' for the damages, that, therefore, only the defendants are responsible."

We think the ground assumed by the learned judge in this case, at the trial term, is untenable. If the Vixes were indemnitors, they were only such as to Mr. Henry, the only person with whom they contracted, as it must be assumed from an inspection of the contract, that he only contracted on his own behalf, and for his own security, and to relieve himself from all liability to others, by reason of any of the work done upon his premises. In fact, this was conceded by the court below, for the only circuity of action possible, is that the plaintiff should first sue Henry, and if she recovered, Henry might have an action over against the Vixes for the amount he was compelled to pay her. It follows that the plaintiff cannot recover against the Vixes unless she had a right of action against Henry. To hold otherwise, is to say that the stipulation in the contract was inserted by Henry, not to protect him from claims which he supposed could be enforced against him, but so that "any neighbor or passerby," might have a right of action against the Vixes, in cases where such persons could not have a right of action against him, and this irrespective of the question of whether the damage was lawfully or unlawfully done, for the clause is not restricted. The question then resolves itself into this: were the acts complained of such as would authorize a recovery against Henry, provided the work had been done by the Vixes themselves under the contract they had made with Henry? In other words, would Henry be protected from liability under the rule of *respondeat superior?* This in turn depends upon the answer to another question: Did the damage necessarily result from the nature of the work itself or did it result from the manner in which the work was

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performed? If the work done was bound to produce the result, the person for whose benefit the work is done cannot shield himself by showing that the work was done by an independent contractor. *Dorrity* v. *Rapp*, 72 N. Y. 307. But if it resulted from the method in which the work was done, the person benefited having no control over such method, or of the persons pursuing it, then the contractor is solely liable. These are elementary principles, and so firmly established that they need no citation of authority to sustain them. It remains then to be determined whether work of which blasting forms an essential part, is dangerous in itself or whether it is devoid of danger unless improper methods are used in the employment of it. The tendency of courts in this state at first was toward the view that it was inherently dangerous, and that a person employing another to do such work would be responsible for injuries arising therefrom without showing negligence on his part. But the later decisions all tend to hold that blasting is not dangerous in itself, and we think that view is now firmly established by the courts of this state. *Blake* v. *Ferris*, 5 N. Y. 48; *Pack* v. *Mayor*, *etc.*, 8 id. 222; *Kelly* v. *Mayor*, *etc.*, 11 id. 432; *Herrington* v. *Lansingburg*, 110 id. 145. In the latter case the facts were that defendant entered into a contract for the construction of a sewer in one of its streets. The contract provided that all damage done in the construction should be paid by the contractors; plaintiff's team, which was standing in a street crossing the one in which the sewer was being constructed, was frightened by the noise of a blast fired by the contractors in the prosecution of the work, and while attempting to control the horses, plaintiff was injured; held, that the defendant was not liable; that if there was any culpable negligence which caused the injury, it was that of the contractors and they alone were responsible; and Judge EARL, in the course of the opinion says: "The accident was in no way caused by any imperfect condition of the street, but simply by noise resulting from the blast. If there was any culpable carelessness which caused the injury to the plaintiff it was

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that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blast and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could in some degree smother the blasts so as to prevent falling rocks and much of the noise of the explosion; or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it were a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given notice; but the duty to give it did not devolve upon the village, and for these conclusions the cases of *Pack* v. *Mayor*, 8 N. Y. 222; *Kelly* v. *Mayor*, 11 id. 432, and *McCafferty* v. *Spuyten Duyvil, etc., R. R. Co.*, 61 id. 178, are ample authority. It is conceded by the learned counsel for the plaintiff that if the plaintiff had been hit by a fragment of rock thrown by the blast, the defendant would not have been and the contractors would alone have been responsible. So too, if a fragment of rock had struck one of the horses or had fallen or passed near them and this had frightened them causing the injury to the plaintiff, within the authorities cited, the defendant would not have been responsible * * *. A rule which would cast responsibility upon the defendant for injuries resulting from the noise of the explosion and exempt it from responsibility for injuries caused by fragments of rock thrown by the explosion, would rest upon no rational basis and require distinctions too fine for the practical administration of justice." See also *Brennan* v. *Gellick*, N. Y. Law Journal, April 29, 1892. These authorities all establish that blasting rock does not necessarily cause injury, and that damage arising therefrom is solely the result of employing it negligently and that when the work is done by an independent contractor, he only is responsible for such damage. In other words it seems to be the settled law of the courts of this state that they will take judicial notice that blasting is not injurious to persons or property *per se* or unless con-

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ducted in a negligent manner. That it was negligently done in this case by the subcontractor Dolan is apparent from the number, depth and proximity of the holes drilled to each other and to plaintiff's premises and their simultaneous discharge. The force developed must have been terrific, and one is not surprised at the injuries resulting to plaintiff's premises. But all these matters were under the control of the subcontractor Dolan and not of Henry or even the Vixes. The court below in its ruling followed *Water Co.* v. *Ware*, 16 Wall. 566, where many of the facts were similar to those now under consideration. But this case was decided on a principle which cannot be applied to the contract of a private person. It held that where a water company had agreed with a municipal corporation to be responsible for damages while laying water pipes in the street, a party injured by the negligence of those doing the work could recover against the water company. The water company was held liable in a suit by the person injured, because the municipality was also liable, on the ground that, being charged with the control of the streets, they must keep them in a safe condition for travel; that the agreement with the water company would not acquit the municipality of an obligation, otherwise attaching, to keep the streets safe and convenient for travelers, and that the person injured might sue the water company because it might well be held that a party injured through a defect or want of repair in such a street, occasioned by the neglect or carelessness of such a contractor in doing the work, or of those for whose acts he is responsible, may, at his election, sue the contractor for redress or pursue his remedy against the municipality, as it is clear that the contractor, in case of a recovery against the latter, would be answerable to the municipality as stated in his agreement. This is a very different case from the one at bar. In this case Henry, for whose benefit the work was done, did not owe any duty to third persons in reference to it unless he undertook to do it himself, as shown by the cases before cited, but the city of St. Paul, as a municipality was charged with the duty of keeping its streets safe for those using them and it

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did not have the power to make a contract by which others assumed to perform a part of the functions imposed upon it by law, so as to relieve it, but as the city had been indemnified against damage caused by those who so assumed, the person injured could sue the indemnitor direct, for, if the suit was brought against the city and a recovery had, the city could in turn recover the amount from its indemnitor. But this would involve two suits, whereas the same object could be accomplished without prejudice to the indemnitor, in one suit, brought by the person injured against the contractor direct, thus avoiding circuity of action. The rule that municipalities cannot by contract shift the duties imposed upon them by statute upon those assuming to contract with them for that purpose, is fully recognized in this state. *Storrs* v. *Utica*, 17 N. Y. 104, cited in *Water Co.* v. *Ware*; *Brusso* v. *Buffalo*, 90 id. 679. The head-note in *Water Company* v. *Ware*, 16 Wall. 566, is misleading. It seems to assert the broad proposition that in all cases where indemnity has been given, the indemnitor may be pursued in the first instance by a person injured, which as before shown, was not decided by the court, but is authority only for the proposition that when a contractor is engaged in performing work in which an injury is done for which the person or corporation with whom he contracted is liable, then if the contractor has indemnified such person or corporation the person injured may sue the contractor direct on the principle of avoiding circuity of action. But the cases we have before cited from the highest court of this state are abundant authority for holding that where the accident is caused by blasting, there would be no liability even of a municipality and *a fortiori* there could be no liability of a person not charged with a special duty, always assuming that the work was done by an independent contractor. It follows that to sustain the rulings of the court below it must be held that the Vixes are liable to the plaintiff in a case where the owner could not be held responsible by her. Such liability existing, not by virtue of anything inherent in the nature of the work, but solely by reason of a stipulation between the owner and

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the contractor, to which she was not privy and concerning which it does not appear that she had any knowledge before the damage was done. It is self-evident that if the work was such that Henry would not be liable if performed by his contractor, then the same rule would protect the Vixes on their subcontract, where a similar provision was inserted in their contract with Dolan, who did the work as an independent subcontractor. *Slater* v. *Mersereau*, 64 N. Y. 138.

The case of *Storrs* v. *Utica*, 17 N. Y. 104, is the only one in any way in conflict with the foregoing reasoning, and that, we think, has been entirely overruled or greatly modified by the Court of Appeals in *Charlock* v. *Freel*, 125 N. Y. 357. But assuming that *Water Co.* v. *Ware* does establish that Henry was liable to the plaintiff and that she could, therefore, sue the Vixes direct because liable over to Henry, still the plaintiff ought not to succeed here, for she did not bring herself within the conditions laid down in that case. There the gravamen of the action was negligence, and the fact that the jury found that there was negligence permeates the whole opinion. Here, although the plaintiff had alleged that the Vixes were liable solely because of negligence, the court expressly held that she was entitled to recover without showing such negligence.

The plaintiff's theory that the defendants are insurers, has no countenance from *Water Co.* v. *Ware*, 16 Wall. 566. If the defendants were insurers of Mrs. French, then she was insured as to her own property without her knowledge, by Henry, who did not act as her agent and who had no insurable interest of his own in her property. A contract of insurance by a person having no interest would be void, as a wager policy. Again, no consideration was paid by Henry to the Vixes for the insurance of Mrs. French. All that he desired was to have a building erected in accordance with the specifications and to be secured from any damages either in contesting or otherwise disposing of any claim for damages arising out of the work. The consideration paid by him to the Vixes was for this and nothing more. The preceding

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part of the contract, in which the stipulation under consideration occurs, shows that the only person sought to be protected by that contract was Henry himself; his sole aim was that he should not be called upon to pay such damages, and the Vixes did not, by that contract, estop themselves from asserting that a claim was not valid against them on the ground that Henry could not be compelled to pay if Mrs. French sued him.

Plaintiff also claims that in *McMahon* v. *Second Avenue R. R. Co.*, 75 N. Y. 231, the defendant was held liable under a contract. We think the learned counsel has fallen into an error in respect to this case. The defendant was sued in negligence. A contract was offered in evidence and it was proved that the defendant had been negligent in the discharge of its duties under that contract, and so the court held that "the reception of the agreement in evidence did not change the cause of action from one arising in tort to one based upon contract." In the case under consideration the recovery was had on the contract alone, without proof of negligence thereunder, although the complaint alleged that the cause of action arose through negligence under a contract.

Little v. *Banks*, 85 N. Y. 258, cited by the learned counsel for the plaintiff, is not in point in this case. There the contract was made by a state officer with a bookseller, and the point of the decision was that the action could be maintained by Little on a contract made between Banks and the state, where the officers enter into it for the advantage and welfare of the public and where such a provision constitutes a material portion of the agreement which is essential to carry it into effect. The contract between Henry and Vixes was not made by Henry as a public officer for the welfare of the public, but as a private individual for his own benefit, and the stipulation as to damages was not a material portion of the agreement which is essential to carry it into effect.

In *Todd* v. *Weber*, 95 N. Y. 181, the foundation of the liability was that "The natural obligation arising out of his relation to the child is a sufficient consideration for a contract on

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his part to pay for its support and maintenance." But Henry owed no obligation to the plaintiff or any other neighbor or passerby, and nothing in Henry's relations with the plaintiff constituted a consideration as between them that entitled her to any benefit in the stipulation. Besides in *Todd* v. *Weber* the promise was made to do a specific thing for a specific person. But the stipulation in the case at bar is for the benefit of Henry alone, or else must be for the benefit of the whole world. In *Rector* v. *Teed*, 121 N. Y. 583, there was a promise on consideration to pay a specific sum to a specific person. The court says, "a party for whose benefit a promise was made may sue in assumpsit thereon even if the consideration therefor arose between the promisor and a third person." But in this case, as far as we can perceive, there was no consideration from Henry to the Vixes for a stipulation inuring to the benefit of third persons. Henry wanted a house built and he agreed with the Vixes to pay a certain sum for having it built; that sum was the consideration for the building of the house, and incidentally to save Henry harmless from any claim in connection therewith. In *Vrooman* v. *Turner*, 69 N. Y. 280, the rule is laid down, "To enable a third party to enforce a promise, there must be privity by substitution between the parties, or some prior right or claim against one of the contracting parties, by which he had a legal interest in the performance of the agreement."

We, therefore, think that the court erred in withdrawing the question of negligence from the jury, and in holding that without any proof of such negligence the Vixes were liable. The verdict of the jury should, therefore, be set aside and a new trial ordered, with costs to the defendants Vix to abide the event.

Daly, Ch. J., and Bischoff, J., concur.

Verdict set aside, new trial ordered.

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Matter of Loewenstine's Will.

(New York Common Pleas — General Term, February, 1893.)

On August 8, 1888, testator made his will, leaving to his wife a legacy of $500, "as ten thousand dollars of life insurance is in her name, and she has proven herself not to be a loving wife." He died in April, 1890, in an insane asylum, of progressive paresis, a mental disorder which has its incipiency about three years before death, and indicates its presence by three consecutive stages, the first two being accompanied by delusions. *Held*, that this evidence was conclusive that, at the time of the execution of the paper propounded as his will, he was unduly influenced by delusions which injuriously affected his natural regard for his wife, and a finding by a jury that testator was not possessed of testamentary capacity should not be disturbed.

To establish the existence of said mental disorder, contestant offered the testimony of two physicians who had been in actual professional attendance upon deceased. This was objected to under section 834 of the Code. The court ruled that the witnesses were competent to testify to any knowledge obtained from personal acquaintance with decedent before their professional relations with him commenced and after they ceased, and excluded all testimony affecting knowledge obtained during the pendency of the relation. *Held*, that the ruling was proper.

A physician, pending a visit to the medical superintendent of the asylum, during which he assisted the superintendent in the discharge of his official and professional duties, had secured knowledge of testator's condition, and was permitted to testify as to the same. *Held*, that under section 836 of the Code of Civil Procedure, as amended, Laws 1892, chapter 514, the testimony was competent.

Appeal from an order denying proponent's motion for a new trial.

Trial of issues in proceedings for the probate of an alleged last will and testament, pursuant to the provisions of section 2547 of the Code of Civil Procedure.

Daniel G. Rollins, for proponent (appellant).

Otto Horwitz, Esq., for contestant (respondent).

Bischoff, J. The paper propounded as the last will and testament of Henry M. Loewenstine, was executed August 8, 1888, and contained the following provision: "Second. I

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hereby give, devise and bequeath unto my wife, Rosa, the sum of five hundred dollars, as ten thousand dollars of life insurance is in her name, and she has proven herself not to be a loving wife." No other provision was made for the wife, and the remainder of the estate was left in trust for the use and benefit of an infant daughter, Gladdys, the decedent's only child. He died in April, 1890, while confined as a patient in an asylum for the insane known as the Long Island Home, at Amityville in this state. From conclusive evidence, it appears that his death was directly attributable to a mental disorder scientifically termed *dementia paralytica*, but popularly known as progressive paresis, which has its incipiency about three years before death, and indicates its presence by three consecutive stages, the periods of exaltation, depression and absolute dementation, the first two stages being accompanied by delusions. It was conceded by the subscribing witnesses that, at the very time of the execution of the alleged will, the sanity of the decedent was a matter of serious concern, and it was abundantly shown that, at or about this time, he was in a state of intermittent exaltation and depression, which denoted his gradual transition to the state of absolute dementation immediately preceding his death. A number of witnesses, acquainted with the decedent and his family, testified to the effect that previous to the incipiency of the disorder which culminated in his death, the domestic relations of the decedent were more than ordinarily felicitous, the mutual devotion of husband and wife marked and pronounced, while thereafter he became petulant and querulous, accusing his wife upon trivial and sometimes wholly imaginary grounds, at intervals of constantly growing frequency, of neglect of himself and their infant daughter, though her devotion both as wife and mother had been unceasing. Upon this evidence the conclusion is irresistible that the decedent at the time of the execution of the paper propounded was unduly influenced by delusions which injuriously affected the natural regard for his wife, and, assuming that there are no errors in the admission or exclusion of evidence, the jury's finding that the dece-

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dent was not possessed of testamentary capacity, should not be disturbed.

To establish the existence of the mental disorder which led to his death, contestant offered the testimony of Doctors Wolstein and Schweig, physicians who had at times been in actual professional attendance upon the decedent. This proponent objected to as incompetent under the provisions of section 834 of the Code of Civil Procedure, "that a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The court thereupon ruled that the witnesses should be permitted to testify to any knowledge obtained from personal acquaintance with decedent before their respective professional relations with him commenced, and after they ceased, and excluded all testimony affecting knowledge obtained during the pendency of the relations; and hereto proponent excepted. The ruling is, however, sanctioned by the Court of Appeals in *Fisher* v. *Fisher*, 129 N. Y. 654.

One further exception was taken to the admission of Dr. Williams' testimony, who, though not actually in professional attendance upon the decedent, had secured knowledge of his condition pending a visit at the Amityville Asylum as the guest of Dr. Carpenter, the medical superintendent, during which time he had assisted Dr. Carpenter in the discharge of his official and professional duties. This exception is, however, equally unavailing. The testimony related wholly to matters which were alike apparent to all persons sufficiently skilled in medical science, whether called to attend professionally or not so; and the statute which disqualifies an attending physician was designed to exclude only such information as only the physician in actual professional attendance upon the patient could acquire. For instance, as here, *dementia paralytica*, or progressive paresis, has certain well-defined indications which are exteriorally perceptible to almost every person. From these indications one learned in the science of

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medicine concludes the presence of the disease, makes his diagnosis, as the physician terms it; but his professional attendance upon the afflicted is not necessary to enable him to do so. But it is useless to pursue the discussion since by recent amendment of section 836 of the Code of Civil Procedure (see chap. 514, Laws 1892) the testimony is made competent beyond peradventure.

The order appealed from should be affirmed, with costs.

DALY, Ch. J., and PRYOR, J., concur.

Order affirmed.

FISHER *v.* MONROE.

(New York Common Pleas — General Term, February, 1893.)

So far as it relates to the issues on trial, it is error to exclude the cross-examination of plaintiff on a former trial, unless the attention of the witness is first called to it; nor is the error cured by afterwards admitting portions of it in rebuttal, in order to impeach the witness.

Where a hypothetical question, put to an expert witness, does not fully and fairly state all the facts which have been proved in the case, bearing upon the issues to be determined, it is error to admit the testimony.

A contract of employment provided that either party might cancel the agreement by giving two weeks' notice to the other. *Held*, that on a discharge without notice, plaintiff was entitled to two weeks' salary as damages.

APPEAL from an order of the General Term of the City Court of New York, affirming a judgment entered upon a verdict in favor of the plaintiff.

Wilson W. Hoover and *William Sulzer*, for defendants (appellants).

Seaman Miller, for plaintiff (respondent).

BOOKSTAVER, J. This is the second appeal to this court (16 Daly, 461), and it is unnecessary to state the facts further than will be needed to understand the questions raised on this appeal. The action was for damages sustained by the plain-

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tiff, an actress, by reason of her alleged wrongful discharge by the defendants, who were theatrical managers and proprietors, before the end of the season specified in the contract between them. The chief ground of the reversal on the former appeal, was that the contract would not necessarily be terminated by a mere temporary disability of the plaintiff, but that as no sufficient excuse for her nonattendance at the rehearsal had been shown, a verdict in her favor could not be sustained; consequently, the chief contention on the second trial centered around this question. In aid of their contention, the defendants' counsel offered plaintiff's cross-examination on a previous trial in evidence, to prove admissions by her as to whether or not she was ill or merely tired out, and also to prove her admissions as to her duties as an actress upon rehearsals.

The court excluded the evidence unless the attention of the witness was first called to what she had testified to on the former trial. The defendant's counsel thereupon stated to the court that it was not for the purpose of impeaching the witness, but to prove admissions made by her. Still the court would not allow him to do so, and defendant's counsel excepted.

It is well settled that an admission made at one stage of an action, binds the parties at all subsequent stages, as primary evidence. *Larrison* v. *Payne*, 23 N. Y. St. Repr. 438; *Scofield* v. *Spaulding*, Id. 108; 54 Hun, 523; *Tooker* v. *Gorner*, 2 Hilt. 71. The rule which makes it incumbent upon the cross-examining counsel first to direct the witness' attention with reasonable precision to, and interrogate him respecting an alleged contradictory statement before the latter, may be given in evidence (*Crane* v. *Hardman*, 4 E. D. Smith, 448; *Everson* v. *Carpenter*, 17 Wend. 419; *Root* v. *Brown*, 4 Hun, 797), does not apply to parties to the action (*Kennedy* v. *Wood*, 52 Hun, 46; 22 N. Y. St. Repr. 132; *Boehm* v. *Miller*, 45 id. 281); and as to them the alleged contradictory statement is admissible as a declaration against interest. *Cook* v. *Barr*, 44 N. Y. 156; *Williams* v. *Sargeant*, 46 id. 481.

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And in *Meyer* v. *Campbell*, 1 Misc. Rep. 283, we held that though the statement be a part of a pleading which has been superseded by the service of an amended one, it could still be given in evidence. And in the same case we held that the defendant had the right to offer, and it was error to exclude, plaintiff's deposition taken *de bene esse*, which was at variance with the allegations of the amended complaint, although that deposition was not competent in plaintiff's favor, since he was present at the trial, but on the ground that it was a declaration against his interest. It was, therefore, error to exclude the cross-examination of the plaintiff on the former trial, as far as that related to the questions at issue on this trial. Nor was this error cured by afterwards admitting portions of it in rebuttal in order to impeach the witness, as it must be apparent that the force of the evidence was greatly weakened by the cross-examination imposed on defendants as a preliminary, and the jury might well have been misled as to its weight and effect in consequence; for such a course is very likely to prejudice the minds of a jury, especially in the case of a lady, on account of the necessarily unpleasant position in which the party is placed thereby, and the apparent harshness of such a course. Besides, the admission was not as broad as the former offer of the defendants.

We also think it was error to admit the testimony of plaintiff's experts against defendants' objection to the hypothetical question, as in our judgment that question did not fully and fairly state all the facts which had been proved in the case bearing upon the issues to be determined.

When this case was before us on the former appeal, defendants were not in a position to raise the question as to the extent of the damage recoverable in this action, because that had not been sufficiently raised in the court below upon the former trial. But it was distinctly raised on this by defendants' fifth request to charge, which was: "If you find for the plaintiff, then she shall be entitled to recover only for two weeks' salary, with interest, less any amount she may have received for services rendered." This was declined by the

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court, and defendants excepted. The contract expressly provided that either party should be at liberty to cancel the agreement by giving two weeks' notice to the other; and in this respect follows the custom in hiring servants. Sedgwick on Damages lays down the doctrine that notice in such cases was provided in order to allow for liquidated damages. If plaintiff had been paid two weeks' wages in advance when discharged, she would have had no cause of action. And it is difficult to conceive of a more peremptory notice than the one given the plaintiff. This very question came up for consideration in the City Court in the case of *Peverly* v. *Pool*, cited and approved in *Parry* v. *Am. Opera Co.*, 19 Abb. N. C. 270, where the court, in delivering the opinion, said: "The only injury which plaintiff could suffer by reason of not receiving the two weeks' notice provided by the contract, would be the amount of the salary for two weeks, and this amount was allowed by the trial court."

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

Bischoff, J., concurs.

Pryor, J. I concur in the result, but without committing myself to the rule of damages propounded in the prevailing opinion.

Judgment reversed, new trial ordered.

Matter of Gannon's Will.

(New York Common Pleas — General Term, February, 1893.)

On a jury trial of the issues arising on the probate of a will, the widow of testator testified as to transactions between herself and husband; a sister testified as to what deceased had told her in regard to the wife; the physician gave testimony as to whether testator had the disease he imagined he had, and the clergyman testified as to conversations he had with testator. No objection was taken to this testimony when offered, and no motion made during the trial to strike it out. *Held*, that as the

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facts testified to by the above witnesses were established by the competent testimony of other witnesses and by deceased's own letters, no injustice was done calling for reversal and a new trial.

A separation agreement executed in 1890, is not admissible on a contest of the husband's will made in 1887, to show the motive for peculiar provision of the will.

The issues in a will contest having been tried before a jury, they found that decedent had testamentary capacity at the time of the execution of the will, but it was also established that the testator was a monomaniac in respect to his wife's fidelity, and as to her having communicated to him a venereal disease, and that this was a delusion affecting the will. *Held*, that an order setting aside the will should be affirmed.

APPEAL from an order made in the above-entitled proceeding, denying a motion for a new trial.

Abram Kling for proponents (appellants).

James P. Campbell for Sarah Gannon, respondent.

William F. Clare for Bridget McGrath, respondent.

Charles H. Beckett for Catharine Brophy, respondent.

BOOKSTAVER, J. The alleged will of John Gannon was executed on November 19, 1887, and was contested by all his next of kin, namely, his widow, Sarah Gannon, and his sisters, Bridget McGrath and Catharine Brophy. By section 2547 of the Code, the surrogate may direct any special proceeding for the probate of a will, to be determined in the Court of Common Pleas, and he so directed in this case. The issues so sent to this court were tried by the court and a jury, and resulted in a verdict in favor of the contestants. This verdict can be reviewed only by a motion for a new trial upon the minutes, and must be considered the same as in a case tried by a jury under section 999 of the Code when a motion is made for a new trial upon the minutes, and in such case any errors that may have occurred upon the trial may be reviewed by the General Term. The appellant contends that there were manifest errors in the admission of testimony. The widow was

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allowed to testify as to the transactions between herself and her husband; Bridget McGrath, a sister of the contestant, interested in the estate as a contestant, was allowed to testify as to what the deceased had told her in regard to his wife; George McGauran, the physician who had at times attended Gannon as such, was also allowed to testify as to whether Gannon had the disease which he imagined he had; the Rev. Matthew A. Taylor was allowed to testify as to conversations between himself and the deceased. But no objection was taken to this testimony when offered, nor was any motion made at any time during the progress of the trial to have it stricken out. And although it is true that the court at General Term has the power to reverse for errors, even where no exception has been taken (*Wehle* v. *Haviland*, 42 How. 399; *Kelly* v. *Frazier*, 27 Hun, 314; *Smith* v. *Ins. Co.*, 49 N. Y. 211), yet it will not do so unless it is clear that injustice has been done and justice would be promoted by a new trial, which does not appear in this case. The testimony admitted was for the most part merely cumulative, and the facts testified to by the witnesses whose testimony is now objected to, were established beyond any question in our judgment by perfectly competent testimony of other and disinterested witnesses, by the deceased's own letter, and the testimony of proponent's witness, who was also a physician, and had examined the deceased as such. In this last respect the appellant did precisely the same thing which he now complains of the contestants doing, that is offering the testimony of a physician who had attended the deceased, as to his mental and physical condition. And it is now the well-settled law of this state that when such testimony is admitted by the parties to the proceeding without objection, the result will not be disturbed; in other words, that the objection to such testimony must be specifically taken or the defeated party cannot avail himself of it upon appeal. *Loder* v. *Whelpley*, 111 N. Y. 239; *Hoyt* v. *Hoyt*, 112 id. 493. And in this case particularly we should not reverse on this account, as it is manifest from the case that these witnesses were deliberately

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allowed to testify by the appellant without objection because he hoped to obtain from them certain admissions favorable to himself. A party cannot be allowed to speculate upon the result of an action by willingly admitting incompetent testimony in the hope of an advantage to himself, and afterwards, when he finds that the speculation has been unsuccessful, claim that there was such error in the admissions as to entitle him to a new trial. To reverse in such cases would not be in the interest of justice, but would be putting a premium upon speculation.

Appellant also contends that the court erred in excluding the articles of separation executed between the deceased and his wife. Fol. 89. The will was executed in 1887, and the separation agreement was not executed until 1890. This had nothing to do with, nor could it show in any way any motive for, the peculiar provisions of the alleged will, as it was executed three years after the will. If admitted, it would have simply tended to show that Gannon's delusion possessed his mind completely.

The appellant also claims that the jury having found the decedent had testamentary capacity at the time of the execution of the will, it was error to set it aside on any ground. But it was clearly established on the trial that the decedent was possessed of the idea that his wife was unfaithful to him and had communicated to him a venereal disease; and it was also clearly established that this was a delusion, and that neither the wife had had such a disease, nor had he at any time suffered from it. And it is very certain that this delusion was the chief if not the sole cause for making a will by which he deprived his wife of any portion of his property; the provision for dower amounting to nothing as he had no real estate. The court correctly charged the law in regard to such delusions. In order to invalidate a will it is not necessary that the intellect should be in total eclipse and oblivion or that the testator should be generally insane. There is a partial insanity and a total insanity. Such partial insanity may exist as respects particular persons, things or subjects, while as

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to others the person may not be destitute of the use of reason. A person may have upon some subjects and even generally, mind and memory, and sense to know and apprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty, and the reasonable and proper disposition to them of his estate, he may be of unsound mind. In this case we think it clear that he was a monomaniac in respect to his wife's fidelity, and as to the disease which he claimed she had communicated to him. Monomania is a perversion of the understanding in regard to a single object or a small number of objects with the predominance of mental excitement; while mania is a condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with general mental excitement.

The verdict of the jury in this case preserves and emphasizes that distinction. By it the jury found that Gannon had general testamentary capacity, was not a monomaniac on all subjects, but had an insane delusion affecting the will in question, and was a maniac on that subject, and that such mania influenced the making of the will. This conforms to the rule in this state. Jarmain on Wills, 112; *Forman's Will*, 54 Barb. 274; *Parish Will Case*, 25 N. Y. 9, and cases there cited.

The order should, therefore, be affirmed, with costs.

Daly, Ch. J., and Bischoff, J., concur.

Order affirmed.

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Baer *v.* Koch.

(New York Common Pleas—General Term, February, 1898.)

A verdict in plaintiff's favor, abundantly sustained by the evidence, should not be disturbed, because the jury might have found from the evidence in favor of defendant.

In the absence of an agreement as to the amount of his compensation or of anything to show that his services were gratuitous, a real estate broker is entitled to recover upon *quantum meruit*, in this case, the usual commission paid for such services.

One of the plaintiffs and one of his witnesses, for the purpose of showing what the plaintiffs did in regard to procuring property for defendant, were allowed to testify to conversations with persons, and not in the presence of defendants. *Held*, that the evidence was admissible in order to determine the *quantum meruit* to which plaintiffs were entitled.

A hypothetical question is properly excluded, which does not contain all the facts which have been proved at the time the question is put.

Appeal from a judgment rendered on the verdict of a jury.

Henry G. K. Heath, for defendant (appellant).

Miller & Miller, for plaintiffs (respondents).

Bookstaver, J. The defendant desiring to purchase some lots on One Hundred and Twenty-fifth street, near Third avenue, in the city of New York, for the purpose of erecting a store, requested the plaintiffs to enter upon the work of finding suitable property. After considerable effort on their part, they reported that no such property could be obtained in the desired locality, and then suggested to the defendant the expediency of purchasing further west on One Hundred and Twenty-fifth street, near Lenox avenue, and they were then authorized to look in that neighborhood. They procured several pieces, among which was the property in question, which they reported to the defendant with the terms on which it could be purchased. It appears from the evidence that the plaintiffs were the first persons to whom a price had been given and a sale of this particular piece of property authorized. And the main question litigated on the trial was whether, notwithstanding the plaintiffs submitted this offer to

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the defendant, they were the procuring cause of the purchase, or whether one Bennett, a real estate broker, through one Mr. Hume, was the procuring cause of the purchase, and this question was the main one submitted to the jury by the court, which found a verdict in favor of the plaintiffs. A motion for a new trial upon the minutes was made and denied.

It is no doubt true, as contended by appellant, that in this action the burden of proof was upon the plaintiffs to establish their case, which from the verdict they successfully did, and while the jury might well have found in favor of the defendant, yet the evidence abundantly sustains the conclusion to which they arrived, and we see no reason why it should be disturbed. But appellant contends that notwithstanding this verdict the plaintiffs should not recover, because they showed no express promise on the part of the defendant to pay the brokerage; but an employment for services involves an obligation to pay compensation therefor. In the absence of an agreement respecting the amount of compensation or of anything to show that the services were merely gratuitous (and our experience with real estate brokers, as gathered from the many cases brought in the court, is that they never work gratuitously), the law implies a reasonable amount, a *quantum meruit;* but a *quantum meruit* in this case is the usual commission paid for such services. *Levy* v. *Coogan*, 9 N. Y. Supp. 534; *Crombie* v. *Waldo*, 17 id. 373; *Briggs* v. *Boyd*, 56 N. Y. 289; *Milliken* v. *West. Un. Tel. Co.*, 110 id. 412; *Sibbald* v. *Bethlehem Iron Co.*, 83 id. 383. A broker employed to purchase property, cannot properly act for the seller; his duties are to act in the interest of the purchaser, which is to procure the property at the lowest price possible; hence the reason for the rule which prohibits the broker from recovering compensation from both parties without their consent to his acting in the dual capacity. *Dunlop* v. *Richards*, 2 E. D. Smith, 181; *Pierce* v. *Thomas*, 4 id. 354. By attempting to act for both sides he loses his claim for commissions and can enforce payment from neither one. *Rice* v. *Wood*, 113 Mass. 133; *Farnsworth* v. *Reinmer*. 1

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Allen, 494; *Walker* v. *Osgood*, 98 Mass. 348; *Bell* v. *McConnell*, 37 Ohio St. 396; *Carpenter* v. *Hogan*, 40 id. 203. The broker for the purchaser not being allowed to act for the seller, cannot lawfully claim compensation from the seller, and when he is entitled to compensation for his services in such case, he must get it, if at all, from the purchaser who authorized him to act and for whom he did in fact act. *Jarvis* v. *Schaefer*, 105 N. Y. 293; *Sussdorff* v. *Schmidt*, 55 id. 319. The testimony both as to amount of commissions and the custom to pay them was ample to sustain the verdict; and they were entitled to them because, as found by the jury, they procured the property, brought it to defendant's notice, at the price and upon the terms which the defendant accepted. The latter might have closed the contract when the plaintiffs first brought the property to his attention, upon precisely the same terms that he ultimately paid. Mr. Bennett's efforts in the matter of reducing terms wholly failed and his services were of no practical avail to the defendant. Having employed the plaintiffs to procure the property for him, and they having done so, the defendant could not complete the purchase himself and thus deprive the plaintiffs of their commissions. *Paulsen* v. *Dallett*, 2 Daly, 40; *Martin* v. *Silliman*, 53 N. Y. 615; *Fraser* v. *Wyckoff*, 63 id. 448; *Lloyd* v. *Matthews*, 51 id. 124; *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 383; *Morgan* v. *Mason*, 4 E. D. Smith, 636; *Chilton* v. *Butler*, 1 id. 150.

But appellant contends that the complaint should have been dismissed because the evidence shows that plaintiffs knew the property was wanted for the purpose of erecting thereon a store for the business of defendant's firm, and that his partner should have been joined in the action. But this question was left to the jury upon the evidence as to whether plaintiffs knew that fact or not, and their attention was sharply drawn to it by the charge of the court and they have found upon the evidence in plaintiff's favor upon that point, which is conclusive upon us in the absence of passion, prejudice, fraud or mistake, none of which appears in this case. It, therefore, only remains to examine the exceptions taken to

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the admission and exclusion of evidence and to the court's charging as requested by the plaintiffs and refusal to charge as requested by the defendant.

One of the plaintiffs and one of his witnesses were allowed to testify to certain conversations with persons other than parties to the action and not in their presence. These questions were asked not for the purpose of sustaining the main issues in the case, but simply by way of showing what the plaintiffs did in regard to procuring property for the defendant, and where admissible in order to determine the *quantum meruit* to which the plaintiffs were entitled. The objection as to conversations with Mr. Place was not well taken, as he was the agent for his wife and acted for her as such agent throughout the negotiations. Nor can it be justly said that the plaintiff Baer on the witness stand misrepresented Mr. Place's ownership of the property; we think the testimony only went to show that he was acting as such agent. It was not error to exclude the question asked of Mr. Bennett, a witness called on behalf of the defendant, as to whether or not the Place property was upon the sale books of real estate brokers in Harlem. That question was entirely immaterial to the determination of the issues in controversy in this action; nor did it tend to contradict the efforts made by the plaintiffs to procure property. The hypothetical question put to Mr. Libby, a witness called on behalf of the defendant, was properly excluded, as it did not contain all of the facts which had been proved at that time. In short, we find no error in the admission or exclusion of evidence in this case which could by any possibility have injured the defendant, which must appear before we would be justified in reversing a judgment on this account.

The appellant requested the court to charge "that in the absence of an express agreement on the sale of real property, the vendor pays the brokerage." It is quite true this is the general rule as far as the vendor is concerned when he employs a broker to sell for him, but the court properly qualified this request by saying, as it did, "that is upon a sale of it; this is

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a question of purchase;" where, of course, the person desiring the purchase to be made and employing a broker to procure it, is bound to pay for the services. As before shown in the general discussion of the questions under consideration, it was quite proper for the court to charge that "in the absence of any evidence to the contrary, the law would imply a promise to pay for services rendered, and the defendant has no right to expect that those services were gratuitous, unless from some affirmative action on the part of Mr. Baer." And the same is true of the further charge made by the court to the effect "if a party desiring to purchase property employs a broker to find property for him, he is under no obligation to pay unless he consents to take the property which the broker offers; but when he does take the property which the broker offers, his obligation is to pay, unless there is some arrangement that the compensation shall fall upon some other person."

We, therefore, think the judgment should be affirmed, with costs.

BISCHOFF, J., concurs.

PRYOR, J. (concurring). The action is by brokers to recover compensation for negotiating a purchase of property on behalf of the defendant.

By his answer and a motion to dismiss, the defendant interposed the objection of a defect of parties, in that the employment of the plaintiffs, if any, was not by the defendant individually, but by the firm of Koch & Reisenberg.

In point of fact the employment, if any, was by the defendant Koch, but, nevertheless, it may have been for and in behalf of the firm; in which event both members of the firm were necessary parties, provided Koch did not still engage himself only, or the plaintiffs were apprised that their employment was on account of the firm. For a member of a firm acting for the firm may so pledge his individual responsibility as to afford relief against himself alone; or by failure to disclose the joint interest, may subject himself to a several action. *Noe* v. *Christie*, 51 N. Y. 270; *Cookingham* v. *Lasher*, 2

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Keyes, 454, where ruled, that "when a copartner makes a contract in his own name, without disclosing the partnership, when sued individually upon such contract, cannot turn the plaintiff over to a litigation with a stranger." Upon the questions whether the defendant revealed the partnership at the time of the employment, and whether the plaintiffs were informed that they acted for the firm, the evidence was such as to authorize a verdict either way, and the issues having been submitted to the jury on an unexceptional charge, we are not at liberty to gainsay their conclusion.

As to the employment of the plaintiffs, it appears that they were retained, in the first instance, to secure property in a specific locality; that suitable property in that locality was unattainable; that thereupon plaintiffs called defendant's attention to the property in question and suggested its purchase, and that accordingly he did purchase it. Upon these facts it is clear beyond doubt that the defendant did, in legal effect, employ the plaintiffs to purchase the identical property; but if more be needed, it is supplied by evidence of authority to the plaintiffs to look for other property than that first contemplated.

The defendant resists the plaintiffs' claim upon the further ground that they were not the procuring cause of the purchase. But they proffered the property to the defendant for a given price, and he eventually bought for that price. True, he declined the purchase at first; and true also that another broker had directed his attention to the property; but at last he accepted the terms tendered by the plaintiffs. Whether plaintiffs or the other broker were the procuring cause of the purchase, was fairly presented to the jury by the court, and their verdict is conclusive of the controversy. The fact that after the plaintiffs had presented an acceptable vendor, the defendant took charge of the negotiation and concluded it on the terms offered by the plaintiff, is ineffectual to defeat their claim for compensation. *Lloyd* v. *Matthews*, 51 N. Y. 124; *Martin* v. *Silliman*, 53 id. 615; *Knapp* v. *Wallace*, 41 id. 477; *Sibbald* v. *Iron Co.*, 83 id. 378.

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It results, therefore, that as the defendant employed the plaintiffs to make the purchase, their demand was upon him; and they had no claim against the vendor for services he had not engaged them to render.

Nor is it of the slightest effect on the validity of the plaintiffs' claim that the defendant never promised to pay them. Upon the rendition of services at the request and for the benefit of another, the law fastens upon him an obligation to pay their reasonable value; and adjudges the customary or market price to be that reasonable value.

Upon the issues discussed, the evidence was conflicting; but as they were submitted to the jury in a charge of the utmost fairness to the defendant, we repeat that it is not for us to disturb a verdict resting upon sufficient proof, and not, apparently, inconsistent with the interests of justice.

Judgment affirmed.

Compton *v.* Heissenbuttel.

(New York Common Pleas—General Term, February, 1893.)

Defendants chartered plaintiff's boat and agreed to pay the wharfage, at the place of destination, to the owner or lessee of the wharf. Defendants having made default in the payment of the wharfage when due, March, 1882, plaintiff paid it, and in August, 1888, brought suit to recover the amount, with interest. *Held*, that the Statute of Limitations was a defense.

Appeal from judgment of a General Term of the City Court affirming judgment on a verdict.

Action for damages from breach of an agreement by the defendants to pay for wharfage of plaintiff's boat chartered by defendants. The facts sufficiently appear in the opinion.

James L. Bishop, for defendants (appellants).

Hyland & Zabriskie, for plaintiff (respondent).

Pryor, J. When the case was before us on a former appeal, we held that the undertaking of the defendants was

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to pay *the plaintiff* the amount of the wharfage. It appears by the record that the proof varied on the second trial, and that the contract of the defendants was "to pay the wharfage at the place of destination *to the owner or lessee of the wharf*." In either event, however, the period of limitation is identical, namely, six years "after the cause of action has accrued." Code, §§ 380, 382. The defendants plead the statute in bar; and the precise point for adjudication is, when did the cause of action accrue?

The rule is that in the case of torts *quasi ex contractu*, and in actions for breach of contract, the statute begins to run at the date of the tort or the breach, and not when the damage ensues. 13 Am. & Eng. Ency. of Law, 722; *Northrop* v. *Hill*, 57 N. Y. 351; *M'Kerras* v. *Gardner*, 3 Johns. 137; *Bogardus* v. *Young*, 64 Hun, 398; *Hogan* v. *Wolf*, 26 Abb. N. C. 1.

The cause of action alleged in the complaint is the breach by the defendants of an agreement "to pay the owner or lessee of the wharf at the place of consignment," other averments being merely a statement of the damage consequent upon the imputed wrong.

The respondent argues, that either the engagement of the defendants was a contract of indemnity — in which case the right of action would emerge only on the occurrence of the loss indemnified against; or else that their liability was upon an implied agreement to reimburse plaintiff for money paid to their use — in which case the cause of action would arise only on the payment of the money by the plaintiff. But, neither proposition is tenable.

In undertaking to pay the wharfage, the defendants agreed thus to liquidate a part of their indebtedness for the hire of the boat; and in paying it, as between themselves and the plaintiff, they would have merely discharged their own proper obligation. The essential property of a contract of indemnity is an engagement to protect another against loss or liability to a third person; and this quality is not predicable of an undertaking for one's own act or debt, although the accomplishment of the act or payment of the debt would relieve the contractee

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from his liability to another. Hence, in the present case, as appears by the nature of the contract, as well as from the pleadings and proofs, the cause of action is the breach of the defendants' obligation to pay *their* debt, and not a failure to pay a debt of the plaintiff.

Unquestionably, between plaintiff and defendants the relation of surety and principal subsists; so that upon payment of the wharfage by the former, he might have maintained against the latter an action on an implied assumpsit for money paid to their use. But, the complaint proceeds neither upon a contract of indemnity nor an implied contract to reimburse plaintiff, but upon the breach of an express agreement to pay the wharfage; and upon this theory only was the case conducted to judgment. The defendants undertook to pay the wharfage — ten dollars in amount — upon their default the plaintiff paid it; and in an action on an implied assumpsit he could recover only the ten dollars with interest. In fact, however, he has recovered $205.72 — which sum embraces not only the ten dollars and interest, but consequential and collateral damages from the breach of defendants' agreement.

The cause of action sued on, to wit: failure to pay the wharfage, accrued upon the default of the defendants to pay when due, namely March, 1882. The action was commenced August 8, 1888. The case is not one in which a demand was requisite to start the statute. Code, § 410; *Bogardus* v. *Young*, 64 Hun, 398.

Our conclusion is that the Statute of Limitations constituted a valid defense to the action.

Judgment reversed and new trial ordered, costs to abide event.

Bookstaver and Bischoff, JJ., concur.

Judgment reversed, new trial ordered.

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Wahle *v.* McMillan.

(New York Common Pleas—General Term, February, 1893.)

The granting of an order for the examination of a party before trial, under sections 870, 873 of the Code, is discretionary.

Where the plaintiff sues as executor, it is not necessary that his affidavit, upon an application for the examination of a defendant before trial should state a complete cause of action; if it states the nature of the action and the substance of the judgment demanded, it is sufficient.

Appeal from an order of the City Court affirming an order for the examination of the defendant before trial.

Gratz Nathan, for defendant (appellant).

Edward C. Stone, for plaintiff (respondent).

Bookstaver, J. Appeals from the General Term of the City Court to the General Term of this court, are in general governed by the same rules as apply to appeals from the General Term of this court to the Court of Appeals, and that court uniformly refuses to review appeals from orders resting in the discretion of the court below; and in fact, such appeals are prohibited by section 190 of the Code. An order for the examination of a party under sections 870–873, has been repeatedly held to rest in the discretion of the judge granting it. In the leading case of *Glenney* v. *Stedwell*, 64 N. Y. 120, it was held that "if the affidavit discloses such a case as gives the judge power to act, what action he will take is discretionary with him, and may not be reviewed here." In *Jenkins* v. *Putnam*, 106 N. Y. 276, the court said: "While it is said in section 873 that the judge must grant the order when an affidavit conforming to the requirements of the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion. * * * If from the nature of the action, and the other facts disclosed, he can see that the examination is not necessary for the party seeking it, then it cannot be supposed it was the legislative intent that he should be

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obliged nevertheless to make the order." And the court arrived at this conclusion, "it is one of those matters of practice and procedure which should always be left to the discretion of the court of original jurisdiction, and its decision should not be reviewed here, unless it appears from its order that the decision was placed upon some ground of law not involving discretion." See, also, *Woerishoffer* v. *North River Construction Co.*, 99 N. Y. 403; *Herbage* v. *City, etc.*, 109 id. 81. It follows that this order cannot be reviewed by us unless there was a total failure of the plaintiff to present to the court below, facts on which it could exercise its discretion. The affidavit presented to the court on which the examination was ordered, sets forth that the plaintiff had discovered in the books of account kept, owned and left by his testator, a running account with defendant which showed items of charges against, and credits to defendant, and a balance of $268.42, as due the testator from defendant, with interest from November 16, 1891; and that the action was brought on this book account. It then goes on to state that some of the words and figures contained in the book account, are unintelligible to him, inasmuch as the testator simply entered as a part of the book account the amount due from him to defendant, or the amount due from defendant to him. This we think, was sufficient to give the justice granting the order jurisdiction to grant it, especially as the plaintiff was an executor and the facts must of necessity have been more within the defendant's knowledge than the plaintiff's. It is not necessary that the affidavit should state a complete cause of action. It is sufficient if it states the nature of the action and the substance of the judgment demanded, both of which are clearly set forth in the affidavit. *Frothingham* v. *Broadway R. R. Co.*, 9 Civ. Proc. Rep. 305; *Heishon* v. *Knickerbocker Co.*, 45 N. Y. Super. Ct. 54. In *Raymond* v. *Brooks*, 59 How. Pr. 383, which was cited with approval in *Fatman* v. *Fatman*, 18 N. Y. Supp. 847, it was held that "the plaintiff suing in a representative capacity, and not having personally participated in the matters concerning which inquiry is sought, properly

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enough asks that he may be allowed to examine one of the defendants, who is reasonably supposed to have the knowledge to ascertain the facts covered by the questions." And in *Carter* v. *Good*, 57 Hun, 116, it was even admitted by the presiding justice in his opinion, that the affidavit did not contain the essential requisites in ordinary cases, but continues: "The rule with regard to the examination of a party before trial is one of discretion. *Herbage* v. *City of Utica*, 109 N. Y. 81. It is, therefore, flexible, and must be adapted to and controlled by the facts and circumstances of each case, considered with reference to the relations existing between the parties." See, also, *Goldberg* v. *Roberts*, 12 Daly, 339.

We are of the opinion that in this case, under the peculiar circumstances of it, the justice granting the order had jurisdiction to do so, and it rested in his discretion to grant the order, or to refuse it. The appeal should, therefore, be dismissed, with ten dollars costs and disbursements to respondent.

Pryor and Bischoff, JJ., concur.

Appeal dismissed.

Wehle *v.* Loewy.

(New York Common Pleas — General Term, February, 1893.)

The granting of a motion to strike out scandalous matter from an answer is within the discretion of the court, especially where it cannot by itself constitute a defense.

When the plaintiff's attorney is the person aggrieved by the scandalous matter, he may move to strike it out. It is no defense that no party to the action is aggrieved.

Appeal from an order made at Special Term striking out a portion of the answer as irrelevant, immaterial and scandalous.

Benno Loewy in person, for defendant (appellant).

Charles Wehle, for plaintiff (respondent).

Bookstaver, J. The complaint alleges that the plaintiff's assignor is an attorney and counselor at law, and then sets

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forth a special contract made between the defendant and the assignor in regard to certain fees, allowances, etc., to be made and earned in the Surrogate's Court, for which the defendant received $2,500, and the plaintiff claims to be entitled to one-third of the amount under such agreement. The answer admits the receipt of the money and denies all other allegations of the complaint; and for a second defense sets up that plaintiff's assignor was a clerk in defendant's employment at and previous and after the times mentioned in the complaint, and in receipt from the defendant of a weekly salary which was duly paid to and received by the assignor during every week he was employed by the defendant, together with other matters in which is included the portion of the answer which was striken out by the order appealed from. A mere inspection of the portion striken out, shows that it is not relevant or material to the defense set up, which is payment; besides, such an inspection will disclose the fact that the part striken out is highly scandalous in charging a crime upon which no claim of damages is predicated and which is immaterial in so far as it constitutes no defense to the cause of action set forth in the complaint.

The granting or refusal of a motion to strike out as immaterial and irrelevant is always within the discretion of the court (Code, § 545; *Town of Essex* v. *N. Y. & Can. R. R. Co.*, 8 Hun, 361; *St. John* v. *Griffith*, 1 Abb. Pr. 39; *Homan* v. *Byrne*, 4 Weekly Dig. 175; *Williams* v. *Folsom*, 57 Hun, 128); and the same we apprehend is true in regard to scandalous matter especially as in this case where it cannot by itself constitute a defense to the action. Moreover, it is apparent that the most it could do would be to prejudice the jury against the assignor if called as a witness in this action; and we do not see how the complaint could be established without calling him as a witness, when the facts alleged in the part striken out if true, can be brought out upon cross-examination, and we think it will place him in a sufficiently unfavorable light to appear as witness to the claim, assignor of the claim and attorney for the claimant at the same time. We cannot say

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that the discretion exercised by the judge granting the order was improper under the circumstances of this case.

But it is contended by appellant that no party to the action is aggrieved by the matter stricken out, as Mr. Goldzier the assignor, is not a party to the action, and, therefore, the motion should not have been granted. But it is no defense to such a motion that no party to the action is aggrieved, for the Code expressly provides that "any person aggrieved" by the irrelevant or scandalous matter may have it striken out on motion, and in this case it is made by the plaintiff's attorney who is the person injured.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

PRYOR and BISCHOFF, JJ., concur.

Order affirmed.

Matter of MAGNUS.

(New York Common Pleas — General Term, February, 1893.)

Where an assignee for creditors, after having filed his bond and entered upon the discharge of the duties of his trust, dies, his executrix, as the personal representative of the deceased assignee, is entitled, under Laws of 1877, chapter 466, section 10, to be made the substituted assignee, upon giving a bond, duly approved.

Upon October 14, 1892, an order to show cause was made, why an *ex parte* order of September 30, 1892, substituting the deceased assignee's executrix as assignee should not be vacated and set aside, and why she should not account for all property of the assigned estate which had come into her hands as executrix of her husband, the deceased assignee.

On November 11, 1892, an order vacating the order of September 30, 1892, was granted, removing the executrix as substituted assignee in place of her deceased husband, and appointing another in her stead as substituted assignee. *Held*, that as the deceased assignee's executrix was entitled to execute the duties of the trust upon giving bonds, the order of November eleventh should be vacated and set aside. The order of September thirtieth having been made without notice to any creditor or the surety, and on a notice of less than eight days, and without providing that any bond should be given, should not be restored, but a new order entered substituting the executrix as assignee in place of her deceased husband, upon giving a bond, duly approved.

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Laws of 1882, chapter 185, providing that upon the death of a trustee, etc., the trust estate shall not descend to the next of kin or personal representative, but the trust, if unexecuted, shall vest in the Supreme Court, and be executed by a person designated by that court, does not apply to general assignments for the benefit of creditors.

APPEAL from an order made at a Special Term of this court vacating an order made by the court at Special Term, removing Mary C. Steinheauser as substituted assignee, etc.

Abram Kling, for appellant.

Franklin Bien, for respondent.

BOOKSTAVER, J. On or about the 25th of November, 1890, Charles Magnus made a general assignment for the benefit of his creditors to Henry W. Steinheauser, who duly accepted the trust, and the assignment was on the same day filed in the office of the clerk of the city and county of New York. Steinheauser duly filed his bond in the sum of $50,000, as fixed by the court, and entered upon the discharge of his duties as such assignee; thereafter Magnus entered into a composition agreement with his creditors, or most of them, in and by which they agreed to receive and accept sixty-five per cent on the dollar of their indebtedness, in full satisfaction of their demands; and at a meeting of creditors, where the composition agreement was executed, Charles Cottier, respondent in this action, was appointed one of a committee of three persons who recommended the creditors of Magnus to accept the said sum and discharge him from their respective claims, and at that meeting all the parties present agreed to the terms of the composition agreement. Cottier Bros. were tendered their amount under the agreement, but refused to accept the same or to sign the agreement, claiming, as we gather from the papers, that a larger sum had been paid to certain of the creditors. Their claim is now in action in the City Court, in which action they seek to recover $600.87, but which the assignee claims amounted to only $189.56, and he also interposed as a defense the composition agreement and the accept-

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ance of the same by Cottier Bros., and the tender of the amount alleged to be due and owing under the terms of the agreement. It also appears from the papers in this case that an action was instituted in this court by Magnus against one John Mason to recover the sum of $12,411 for goods sold and delivered, in which respondent's counsel appeared as attorney for the defendant, and that judgment was obtained in that action on the 3d day of December, 1891, for the sum of $14,146.77, which was affirmed by the General Term of this court, and thereafter an appeal taken to the Court of Appeals, which is still pending, and during which appeal said Henry W. Steinheauser died; that for the purpose of having that case heard in the Court of Appeals, Mary C. Steinheauser, as the executrix and legal representative of Henry W. Steinheauser, deceased, made an application to the Court of Appeals, that she, as executrix, be substituted as the plaintiff and respondent in that action, and during the pendency of that motion she applied at a Special Term of this Court for an order that she be made substituted assignee in the place of Henry W. Steinheauser, which was granted and this order was submitted to the Court of Appeals, but the motion was denied by that court on the ground that an executor could not be substituted as plaintiff in that action but only as substituted assignee.* On the 14th of October, 1892, one of the judges of this court made an order to show cause upon the petition of the Cottiers, why the order of the 30th of September, 1892, substituting Mary C. Steinheauser, should not be vacated and set aside and why she should not account for all the property of the assigned estate which had come into her possession as executrix of Henry W. Steinheauser and which she may have received as assignee for the benefit of creditors of Charles Magnus; that the Cottier Bros. in their petition, set forth that their claim is for the sum of $600.87, but admit that a set-off is claimed thereto to the amount of $411.31 leaving an admitted balance of $189.56 due them; they also allege in their petition that the said

*Reported, 135 N. Y. 635.

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Charles Magnus has been declared a lunatic and his wife, Cora L. Magnus, appointed as committee of the person and property, and that no notice of said application of said Mary C. Steinheauser to be appointed as substituted assignee was ever served upon them. It also sets forth that on or about the 17th of October, 1892, they instituted an action in the Supreme Court against the assignor and assignee for an accounting and that the time to answer in the said action was extended by the attorney of the plaintiff from time to time, and has not yet expired. It also appears that Mary C. Steinheauser was willing and ready to deposit the amount of the alleged indebtedness to the petitioners with this court or furnish any bond required for the performance of her duty as substituted assignee, and also to obtain the consent of any person interested in the estate that she be substituted as such substituted assignee, which the court apparently failed to consider. It also appears that upon the application for the order made on the 30th of September, 1892, nearly all the creditors had compromised the amount of their respective demands, and the court directed that the service of the order to show cause to be made upon the estate Charles Magnus only.

The order of the 11th of November, 1892, vacated the order of the 30th of September, 1892, and removed Mary C. Steinheauser as substituted assignee in place and stead of her husband, Henry W. Steinheauser, the deceased assignee, and appointed another in her stead as substituted assignee, and appointed a referee to state and pass the accounts of Henry W. Steinheauser, deceased. In this we think the court erred.

By the Laws of 1877, chapter 466, section 10, it is provided "in case an assignee shall die during the pendency of any proceeding under this act, or any time subsequent to the filing of any bond required therein, his personal representative or successor in office or both, may be brought in and substituted in such proceeding on such notice of not less than eight days as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus sub-

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stituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety." Under the common law, where an assignee or trustee died, his legal representative was always appointed in place and stead of the decedent as the proper party to close the trust. *De Peyster* v. *Ferrers*, 11 Paige, 13; *Dias* v. *Brunell*, 24 Wend. 9. And by the express provisions of the act before quoted, the personal representative of a deceased assignee must be brought in and substituted in such proceeding in the place of the assignee, as having the custody of the property of the deceased trustee; and the only exception provided for under that act where such personal representative may not be appointed is where it appears that subsequent to the filing of the bond and before any proceeding had been had thereunder, the surety may apply for the appointment of a new assignee. Hence, if proceedings have been taken it follows that the right of the surety to ask for the appointment of a new assignee is barred. This right of the personal representative to be substituted in the place of the deceased assignee has been determined by the courts of this state, upon the theory that the personal representative having the custody of the property of the deceased trustee is the only person who is able to account for the same. In *Matter of Grove*, 64 Barb. 526; 53 N. Y. 645, it is true that another person was substituted in the room of the deceased assignee, but the court held that the administratrix was the proper party brought in the proceeding for the purpose of the accounting for the trust estate held by the deceased assignee. And in *People* v. *Commissioners, etc., of Brooklyn*, 105 N. Y. 674, the court held that in a special proceeding the legal representative of a deceased who was his widow was entitled by reason of her interest in the estate, in which she may be charged with liability, to be sub-

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stituted in such proceedings and have them continued. In *Boone* v. *Citizens' Bank*, 84 N. Y. 83, the court held that upon the death of a trustee the right to demand and receive the trust fund devolved upon his administrator, and he became successor in law to the deceased as the trustee, who held the same subject to the same trust as his intestate and predecessor in the trust had held it. In *Matter of Wiley*, 119 N. Y. 642, the court held that upon the death of a guardian, executor or administrator, his representatives stand in his place, for the purpose of closing the estate.

Our attention has been called in the supplemental brief (for which no leave was given by the court), to chapter 185, Laws of 1882, which provides that upon the death of a trustee, etc., the trust estate shall not descend to the next of kin or personal representatives, but the trust if unexecuted shall vest in the Supreme Court with powers, etc., and shall be executed by a person designated by that court. This act was passed after section 10 of the assignment act, but we think has no application to assignments and applies only to express trusts which are set forth in section 55, Revised Statutes (8th ed.), 2437. It also appears that express trusts as to personal property (4 R. S. [8th ed.] chap. 2, p. 2516) have reference to the express trusts mentioned and have no reference to proceedings under the assignment laws. But even where the courts may appoint a new trustee, in such cases that power rests in the Supreme Court, and does not lie in the Court of Common Pleas.

In this proceeding, the court below has directed that the executrix, as personal representative of the deceased assignee, shall not be a party to this proceeding, and notwithstanding such order, has directed that she shall account for the property of the deceased assignee which may have come in her possession; but if she is not a party to this proceeding, and holds this property as executrix of her decedent, then the court below had no power to make this order, for as executrix she is only required to account, after a lapse of eighteen months, in proceedings instituted in the Surrogate's Court.

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The respondent claims that Mrs. Steinheauser should not in any event have been appointed the substituted assignee in place of her husband, because she is a woman. It is quite true that this court has been very careful not to take the bond of a married woman in assignment cases, if it could be avoided; but it has frequently had cases where women, and indeed married women, have been assignees.

It was also contended on the argument that Mrs. Steinheauser should not have been made substituted assignee, because certain of her husband's charges may be disputed upon the accounting, but this is only what happens continually in the cases of assignees, and she will be put in no more hostile position to the creditors than is always the case when such questions arise.

It is, therefore, clear that the order of November 11, 1892, should be vacated and set aside. But it is also clear that the order of September 30, 1892, having been made without notice to any of the creditors or the surety, and on a notice of less than eight days, and without providing for any bond to be given on the part of the substituted assignee, should not be restored to vitality. Under the circumstances, all the parties in interest being before this court, we think it is proper that a new order should be made substituting Mary C. Steinheauser as assignee in the place and stead of her deceased husband upon her giving a bond to be approved by one of the judges of this court in the sum of $30,000. No costs of this appeal to either party.

Pryor and Bischoff, JJ., concur.

Ordered accordingly.

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Pucci *v.* Barney.

(New York Common Pleas—General Term, February, 1895.)

Where in an action for work done, a party's right to payment depends on the presentation of the certificate of a third party, and it is produced upon the trial in plaintiff's behalf, and defendant alleges that it is untrue and incorrect, with him lies the burden of proof.

The court permitted plaintiff to prove the custom of surveyors in making allowance to excavators where they are required to excavate below the depth mentioned in the contract, in order to reach a level. *Held*, no error.

The appellate court will not as a rule review mere offers of evidence.

Appeal from a judgment of the General Term of the City Court affirming a judgment entered on the verdict of a jury and affirming an order denying a motion for a new trial.

Arnold & Green, for defendant (appellant).

Ezekiel Fixman, for plaintiff (respondent).

Bookstaver, J. This action was brought to recover the sum of $1,245.20 and interest which the plaintiff claimed was the balance due to him from the defendant for excavating rock and earth from twelve lots belonging to the defendant, which was done under a written contract providing among other things that the "Measurements shall be made by Robert A. Serrell, city surveyor, and the payments shall be on his written certificate," and that the defendant would pay for said work at said prices on the certificate of said surveyor. The answer denied that the plaintiff excavated the amount claimed, and alleged that the amount of rock excavated under the contract did not exceed 9,091 cubic yards, and that the earth excavated did not exceed 5,037 cubic yards, and that the defendant had overpaid the plaintiff for this amount of work for which he counterclaimed, alleging that the overpayments had been made by reason of the incorrect statements of the surveyor. The plaintiff on his part introduced in evidence the certificates of Mr. Serrell, the surveyor named in the

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contract. As was well stated in the opinion of the court below, "the serious objections of the appellant on this appeal are based upon the ground that the admission on behalf of plaintiff of the foregoing certificate of the surveyor made as provided for in the contract did not throw upon defendant the burden of proving that this certificate was untrue and incorrect, as he had alleged in his answer." In the case of *Wyckoff & Meyers*, 44 N. Y. 145, the court says: "Where a building contract provides that the last installment shall be paid by the defendant when all the work is completely finished and a certificate to that effect by the architects under whose direction the work shall be done, the production of the certificate of the architects is conclusive upon the defendant unless obtained through fraud or mistake." And in *Anderson* v. *Meislahn*, 12 Daly, 149, it was held that the parties having selected their own umpire who was to ascertain and determine that the contract had in these respects been complied with, his certificate should be regarded as conclusive and binding upon defendant unless defendant could show that it was obtained by fraud or mistake, or it appears that the contract had not as a whole been substantially complied with. See, also, *People ex rel. Ready* v. *Mayor, etc., of Syracuse*, 65 Hun, 321. In Dr. Abbott's valuable paper on "The Burden of Proof" (Harvard Law Review, vol. 6, No. 3) it is said: "In a number of cases the judges (using general language, though speaking in view of the particular case before them) have said that the burden of proof is always on the plaintiff throughout. It ought to be observed, however, *that the burden of proof is on the plaintiff* only when he has invited the issue; if the only issue to be tried is one which the defendant has invited, the burden of proof is on the defendant. Thus, if the only defense is a denial, the burden of proof is on the plaintiff. If there is no denial, but an admission, express or implied, of the plaintiff's allegations, and the defense is an affirmative statement of new matter in excuse or discharge, the burden of proof is on the defendant." And these propositions he fully illustrates and supports in that article.

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The trial judge, therefore, was fully justified in refusing to charge upon this question as requested by the defendant.*

Appellant also contends that the court erred in permitting the plaintiff to prove the custom of surveyors in making allowances to excavators where the excavator is required to excavate below the depth mentioned in the contract to reach a level. This custom was clearly proved and must have been known to both parties at the time of entering into the contract, and they are presumed to contract in reference to uniform, continuous and well-settled usage pertaining to the matters as to which they entered into an agreement, where such usage is not in opposition to well-settled principles of law and is not unreasonable. *Walls* v. *Bailey*, 49 N. Y. 464; *Sims* v. *U. S. Trust Co.*, 35 Hun, 533; *Ford* v. *Tirrell*, 9 Gray, 401; *Barlow* v. *McKelway*, 22 N. J. L. 165; *Atkinson* v. *Truesdell*, 127 N. Y. 230; *Smith* v. *Clews*, 114 id. 190. Everyone knows that in excavating soil, it cannot be done to the exact line and nothing more, but that some slope must be allowed for or there would be danger of the superincumbent earth falling upon and injuring those doing the work in the excavation. And it is equally clear that in blasting rock in order to obtain a uniform level, there must be some allowance made for excavations beyond the level desired; and where the rock is hard and runs in seams, some must be loosened beyond the exact line of the property to be excavated and must be removed, or its loose condition would be a constant menace to those engaged in the work.

The court did not err in refusing to allow the defendant's offer to prove that he had paid the surveyor Serrell $100. As stated in *Gerard* v. *Cowperthwait*,† handed down herewith, the court will not, as a rule, review mere offers. The offer, even

* The court was requested to charge: *First.* That the burden of proving *the cause of action* is on the plaintiff, and that he must, in order to recover a judgment, prove his case by a preponderance of evidence. This was declined and duly excepted to. *Second.* That unless the plaintiff has proved *his case* by a preponderance of evidence, the verdict should be for the defendant. This was also declined and duly excepted to.— [REP.

† *Post*, page 371.

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if we would review it, is not broad enough. It does not appear from it that the amount paid was more than the defendant was bound to pay the surveyor as his share of the latter's charges. It was not pleaded.

Nor was it error for the court to refuse the defendant's offer to prove that plaintiff took the material of an old house on the premises and agreed to allow defendant $150 for the same. It was a mere offer; it was not alleged in the pleadings and was not within the issues framed thereby.

The judgment should be affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Judgment affirmed.

Peters *v.* Stewart, as Admr., etc.

(New York Common Pleas — General Term, February, 1893.)

On November 17, 1890, a claim against an estate was presented in writing to the administrator who told the person presenting it that he disputed and rejected it, and two days thereafter he signed and left at the plaintiff's house a formal notice in writing disputing and rejecting her claim. Action was commenced May 23, 1891. *Held*, that the action was barred; the Statute of Limitations commenced to run at the time of the verbal notice that the claim was disputed and rejected.

Appeal from an order of the General Term of the City Court affirming a judgment entered upon the verdict of a jury in favor of the plaintiff.

Theodore M. Melvin, for defendant (appellant).

Seaman Miller, for plaintiff (respondent).

Bookstaver, J. The action was brought to recover $333 alleged by plaintiff to be a claim against the estate of defendant's intestate Sarah A. Peck, for board and rooms, washing, care of deceased, preparing body for burial, and use of plaintiff's house for burial, less a credit of seventy-two dollars.

The prime question to be determined on this appeal is whether the action is barred by the short Statute of Limita-

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tions. The claim of plaintiff, together with that of her sister, was presented to defendant as administrator on November 17, 1890; he then told the person who presented these claims that he disputed and rejected them, and two days thereafter he signed and had left at plaintiff's house a formal notice in writing disputing and rejecting her claim. The summons in this action was served upon defendant on the 23d of May, 1891. The statute expressly declares that an action upon such a claim must be commenced within six months after the dispute or rejection of it. Code Civ. Proc. § 1822. The time of publication of the notice to present the claim is immaterial; the bar runs from the rejection and not from the commencement or end of publication of notice. Code, § 1822. And it applies to claims accrued subsequent to, as well as prior to, the death of the intestate. *Cornes* v. *Wilkin*, 14 Hun, 428; 79 N. Y. 129. We think the rejection was ample to effect its purpose. It is true as stated in *Van Saun* v. *Farley*, 4 Daly, 165, "the statute does not mean by rejection merely a mental emotion, but the action of the mind must be followed by some outward act by which the owner of the claim may be apprised of the result arrived at." But here we think there was much more than a mere mental emotion. There is no statute or rule of law which requires the notice of rejection to be in writing or in any particular form. In this case, when the claim was presented, it was immediately disputed and rejected, and the bearer of the claim was so informed at the time. This we think was sufficient. If the agent presenting the claim had authority to present it to the administrator it necessarily follows that he had authority to receive on plaintiff's behalf notice that he accepted or disputed and rejected it. Where a creditor sends a person to collect a claim of a debtor, the latter certainly is authorized to receive and receipt for any money that may be paid him on account of that claim, and where one sends an agent to make a demand of any kind, the answer of the person on whom the demand is made is good when given to the agent, and in law is considered as if given to the principal personally. *Qui facit per alium facit*

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per se is one of the oldest and best-established maxims of the law. Hence, we think the statute commenced to run at the time of the verbal notice that the claim was disputed and rejected. But this was followed up by a written notice to the same effect within two days thereafter, which was left at the house of the plaintiff during her temporary absence, with a person of suitable age and discretion, and the bearer was informed that she "was not in," according to the testimony of defendant's witness, and that she "was not home," according to the testimony of plaintiff's witness; and on the trial, it appeared that she did not actually receive it until two weeks after it was served. Even taking the plaintiff's testimony that she was not at home, we do not think that this was sufficient answer to apprise the defendant that she was absent more than temporarily, or was not at home to visitors, a common expression used by servants when a party does not wish to be seen, although in the house at the time. By section 796 of the Code, it is provided that a notice or other paper in an action may be served on a party or an attorney either by delivering it to him personally, or in the manner prescribed in the next section; and subdivision 4 of section 797 provides that such notice may be served "upon a party by leaving the paper at his residence within the state, between six o'clock in the morning and nine o'clock in the evening, with a person of suitable age and discretion." While it is true that "where any statute or the terms of it require notice to be given, and there is nothing in the context of the statute, or in the contract, or in the circumstances of the case, to show that any other notice was intended, a personal notice must always be given; but the context or circumstances of the case may be such as to show that a personal notice was not intended, and in such case a notice by mail, which is the ordinary mode of giving notice in business transactions, is authorized." We think that the written notice left at the house of the plaintiff under the circumstances of this case was equivalent to a personal notice, and also set the statute running, and for this reason, too, the complaint should have been dismissed.

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It has been said that the Statute of Limitations is a technical defense lacking merit, but it is a defense which the law gives, and as such is entitled to its full weight. "An executor is bound to set up the bar of the statute, and he would not be allowed in his accounting any sum paid upon a debt which, at the time of its payment by him, was barred by such statute." *Butler* v. *Johnson*, 11 N. Y. 212. "Statutes of limitation form part of the legislation of every government and are everywhere regarded as conducive, and even necessary to the peace and repose of society." *Godden* v. *Kimmell*, 99 U. S. 201. "Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. An important public policy lies at their foundation. They stimulate to activity and punish negligence. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and the antidote go together." *Wood* v. *Carpenter*, 101 U. S. 135.

We think, therefore, that the court erred in refusing the motion of defendant to dismiss the complaint on these grounds. And we regret this result the less on account of the extremely unsatisfactory and hazy nature of the testimony offered on plaintiff's behalf to support the claim for board of deceased alleged to be due, and because we think the charges of the plaintiff, not being a professional nurse, for attention during the deceased's illness, and for services rendered in subsequently preparing the body for burial, not being supported by any agreement to pay for them, are of doubtful validity under *Hewitt* v. *Bronson*, 5 Daly, 1.

The judgment should, therefore, be reversed, with costs to the appellant on this appeal and in the court below.

Pryor and Bischoff, JJ., concur.

Judgment reversed.

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Hurst *v.* Trow Printing and Bookbinding Company.

(New York Common Pleas — General Term, February, 1893.)

In pursuance of a contract, defendant L. gave to plaintiff a series of thirty-six promissory notes made by him, and indorsed by the other defendants. Up to April 9, 1892, plaintiff had performed all of the terms of the agreement under which the notes were given, and defendant L. had enjoyed all his rights thereunder. On that day, plaintiff notified defendant L. by letter, that in view of his repeated and continued defaults in payments of some of the notes, he terminated and rescinded the contract, and inclosed the last eleven notes of the series, all of which matured after April 9, retaining eight notes maturing before that date then outstanding and unpaid. Defendant L. by letter acquiesced in the rescission, and notified plaintiff of his consent that the agreement be wholly rescinded and annulled. In an action on two of the last-mentioned notes, *held*, that plaintiff by the notice of April 9, meant simply that he terminated the contract only as to its unexpired period.

Held, further, that as all the unpaid notes up to the date of the rescission had been fully earned by plaintiff by the performance of the contract on his part, and defendant L. having had all the benefits of the contract up to its rescission, both he and the indorsers were liable thereon.

An indorser of a promissory note is not released by mere failure to sue the maker.

Appeal in each action from a judgment against the defendants entered upon the verdict of a jury, directed by the court, and from orders denying motions for a new trial.

Carter, Pinney & Kellogg (*Frederick R. Kellogg*, of counsel), for defendants (appellants).

Andrew Gilhooly, for plaintiff (respondent).

Bookstaver, J. The two actions were tried together, and were founded upon two promissory notes given by John W. Lovell under an agreement between himself and the plaintiff, which provided among other things that during the period of three years after the date of the contract, Lovell was to have the exclusive right to have impressions printed from certain plates belonging to Hurst, and that during the same period the latter should not publish directly or indirectly, any works competitive to those covered by the terms of the

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contract; and for these exclusive rights the agreement provided that Hurst should receive the sum of $90,000, for which sum Lovell should give him thirty-six negotiable promissory notes each for $2,500, payable at intervals of one month respectively, each to be drawn to the order of Trow's Printing and Bookbinding Company, to be indorsed by them, and by the defendant Lange. The agreement also provided this sum of $90,000 was intended not only to include the right to use the plates, but also a consideration for the relinquishment of competing business, and that if the plates were destroyed before the termination of three years, it should not be considered as abating the payment of any portion of this sum. The agreement further provided for the purchase by Lovell of a large amount of book stock and sheets, and that Lovell should be bound at the end of the three years, or at such earlier time as he might desire, to purchase all the plates covered by the contract, for the sum of $75,000, in addition to the $90,000 before mentioned, and that from the making of said purchase Hurst should become bound to refrain from entering into any competing business for twenty-five years after the date thereof, with certain exceptions. Under this contract the thirty-six notes provided for in the agreement, were delivered to the plaintiff, each made by Lovell, and indorsed by the defendants, as provided for in the agreement. Subsequently fifteen of these notes fell due, and were paid at maturity, but the sixteenth and seventeenth notes of the series, which are the ones in suit in these actions, were not paid, as was also the case with six others falling due thereafter. After the delivery of these notes to the plaintiff, he transferred the two in question to Samuel J. Kerr, by whom these actions were originally commenced, but subsequently, in December, 1891, the notes were taken up by the plaintiff from Kerr, and he again became their sole owner, and remained so down to and including the time of the trial. On March 9, 1892, there being at the time seven notes of this series unpaid, including the two now under consideration, Hurst sent the following letter to Lovell:

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"LAW OFFICE OF ANDREW GILHOOLY, TEMPLE COURT BUILDING, 5 BEEKMAN STREET,
NEW YORK, *March 9th*, 1892.

"JOHN W. LOVELL, Esq.:

"DEAR SIR — Your nonpayment of your note for $2,500, payable March 7th, 1892, under our contract of March 4th, 1890, is a breach of condition on your part, and, in view of the repeated defaults on previous notes, I cannot let it pass. I hereby give you notice that your rights under the contract depend on the due payment of the obligations therein referred to, and the performance of the conditions therein named on your part; and these must hereafter be promptly made and performed by you. If the above note, dishonored on the 7th inst. is paid without further delay, and no further default occurs, I am prepared to waive any claim I may have to rescind the contract; otherwise, I shall enforce my right to do so.

"Yours, etc.,

"THOMAS D. HURST."

On April fourth Hurst reiterated the statements contained in that letter by another of that date, and on April 9, 1892, the note of April seventh having gone to protest, signed a letter prepared by his lawyer, which is as follows:

"LAW OFFICE OF ANDREW GILHOOLY, TEMPLE COURT BUILDING, 5 BEEKMAN STREET,
NEW YORK, *April 9th*, 1892.

"JOHN W. LOVELL, Esq.:

"DEAR SIR — Referring to my written notice to you bearing date March 9th, 1892, notifying you that I should enforce my right to rescind my written contract with you, dated March 4th, 1890, in case your note for twenty-five hundred dollars, payable March 7th, 1892, under said contract was not paid without delay, or in case any further default occurred on your part in the performance of the said contract, I now notify you that in view of your continued default in the payment of said note for twenty-five hundred dollars, payable March 7th, 1892, and of your repeated and continued defaults in the payment

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of previous notes given under said contract and your default in the payment of your note for twenty-five hundred dollars, payable March 7th, 1892, under said contract of March 4th, 1890, I hereby terminate and rescind my said written contract with you, bearing date March 4th, 1890, and herewith return to you eleven notes given under said contract of March 4th, 1890, for the sum of twenty-five hundred dollars each, dated March 4th, 1890, and payable to the order of Trow's Printing and Bookbinding Company, at 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 months, respectively, after date.

"Yours, etc.,

"THOMAS D. HURST."

Inclosed in this letter were the eleven notes mentioned therein. To this letter Lovell replied as follows:

"NEW YORK, *April 9th*, 1892.

"THOMAS D. HURST, ESQ., 134 *Grand St., New York:*

"DEAR SIR — I have received your favors of April 4th and April 9th, in regard to our contract of March 4th, 1890, in which you inform me that you rescind this agreement. I have carefully considered the whole matter, and have concluded to acquiesce in this rescission, and I therefore hereby notify you that I consent and agree that the contract in question shall be and is wholly rescinded and annulled.

"Yours very truly,

"J. W. LOVELL."

Meanwhile and up to the 9th of April, 1892, Hurst had completely performed all of the terms of the above-mentioned agreement on his part to be performed, and Lovell had enjoyed the exclusive use of the plates referred to in the agreement, and Hurst had refrained from publishing the books he had undertaken not to publish. The eleven notes returned as before stated, were all notes maturing after April 9, 1892. The eight notes maturing before that date then outstanding and unpaid were retained. Of these Hurst, on April 9, 1892, held and owned five, including the two in question in that action, which actions were then pending, and the remaining

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three were in suit by other parties against Lovell and the defendants herein.

The foregoing facts appearing at the trial, the court, when all the evidence was in, at the request of the plaintiff, directed a verdict in his favor for the full amount of the notes, with interest, to which the defendants excepted, and this exception raises the only question to be considered upon this appeal.

The direction was made at the close of the evidence on motion by both parties for the direction of a verdict, one in favor of plaintiff and the other for the dismissal of the complaints and a judgment in defendant's favor, and neither party asked to go to the jury upon any question, thus submitting to the court for its determination any questions of fact that may have arisen upon the evidence in the case. This gave to the judge the office of the jury and brings up the question whether there was sufficient evidence to support the trial judge's decision. *Green* v. *Shute*, 15 Daly, 358; *Gilder* v. *Davis*, 45 N. Y. St. Repr. 690; *Burrows* v. *Atlas S. S. Co.*, 46 id. 533; *Mayor, etc.*, v. *Sands*, 39 Hun, 519, 524.

Appellant contends that the rescission of the contract of March fourth, discharged both the maker and the indorsers of the notes in suit from any liability thereon. This would be the case if the notices served by Hurst upon Lovell amounted to a rescission in the ordinary acceptation of that term. *Graves* v. *White*, 87 N. Y. 463; 2 Dan. Neg. Inst. § 1306; *Freith* v. *Burr*, L. R. (9 Com. Pleas) 213; 9 Eng. Rep. 393; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434; 36 Eng. Rep. 164; *Mills* v. *Parkhurst*, 126 N. Y. 93; Bishop on Contracts, § 827; *Creighton* v. *Haggerty*, 50 N. Y. Super. Ct. 9; *Weeks* v. *Robie*, 42 N. H. 320; *Conrow* v. *Little*, 115 N. Y. 394; *Fowler* v. *Bowery Savings Bank*, 113 id. 450, and many others which might be cited. The question then arises as to what was really intended by the plaintiff's notice of April 9, 1892. Did he thereby mean that he rescinded the contract *ab initio* or only from and after April 9, 1892, the date of the notice. And this depends upon the construction to be given to the words "I hereby

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terminate and rescind my said written contract," to be determined in the light of surrounding circumstances. Good writers often use the word "rescind" in the narrower sense of terminate a contract as to future transactions. Thus, in making a note at page 145, 28 Abb. N. C., Dr. Abbott says: "The word 'rescission' is often and not improperly used to mean cutting off, termination. Thus Bispham (Eq. J. 556, § 506) says a dissolution of the partnership is a rescission of the contract, meaning of course a rescission as to future transactions." The words "rescission" and "rescind" are used *simpliciter* by the highest authorities to indicate in some cases partial rescission or termination, as well as to indicate in other cases annulment *ab initio*. Thus Leake Cont. (3d ed. 1892) 53, says: "In a case of money lent under a special contract, which was afterwards rescinded by mutual agreement, it was held that the money still remains due, the rescission relating only to the further execution of the contract." FRY, J., says, in *Bluck* v. *Capstick*, 12 Chan. Div. 863, in speaking of the dissolution of a partnership which involved the refusal by defendant, an incoming partner, to pay his bonus or premium after three months' joint conduct of the business, the pretext for his refusal being the allegation that plaintiff had not fairly performed on his part: "It must have regard to the circumstances which have led to the dissolution of the partnership. * * * The allegation of misconduct on the part of the plaintiff filed, and in my opinion the defendant has in effect *rescinded* the partnership agreement without any excuse," and he thereupon went on to decree *payment of the premium* agreeably to the terms of the partnership, thus showing that the rescinding spoken of was not an absolute rescission or annulment of the partnership *ab initio*, but a termination or rescission, restricted to the future. This is made still clearer by the head-note, which states the case as one "where a partnership is dissolved before its natural expiration, etc., without payment of the premium * * * the partner who has agreed to pay it" (if his fault is the sole cause of the dissolution) "will be ordered to pay the whole of it notwithstanding

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the dissolution." In 2 Pars. on Cont. (7th ed.) 677 (star paging), we find these words, "and a suit for the recovery of damages for a breach of the contract is equivalent to a notice of rescission," citing *Graham* v. *Holloway*, 44 Ill. 385. In *Mann* v. *Palmer*, 3 Abb. Ct. App. Dec. 162, the head-note is "acquiescence in the rescission of the executory contract is not necessarily a waiver of an existing claim for profits made under it." Obviously a single word, like the word "rescind," cannot be wrenched from its context and construed alone in its unqualified, strict and technical sense in disregard of the surrounding circumstances. To ascertain the import of the notice the intent must be gathered from the instrument considered as a whole. "It is a cardinal rule in the construction of contracts that the intention of the parties is to be inquired into and if not forbidden by law is to be effectuated. Too much regard is not to be had to the proper and exact signification of words so as to prevent the simple intention of the parties from taking effect, and where the language is susceptible of more than one interpretation, the courts will look at the surrounding circumstances when the contract was entered into, the situation of the parties and of the subject-matter of the instrument." *French* v. *Carhart*, 1 N. Y. 102; appd. *Bridger* v. *Pierson*, 45 id. 601; *Kenyon* v. *Assn.*, 122 id. 258. And this rule has been applied even to the interpretation of charters and legislative enactments. *McGaffin* v. *City of Cohoes*, 74 N. Y. 387. On the general question under consideration, see, also, *Blossom* v. *Griffin*, 13 N. Y. 569; *Zimmer* v. *Settle*, 124 id. 42.

Under the light of these authorities we think the circumstances surrounding the making and termination of the contract should be considered. It is undisputed from the 4th of March, 1890, the date of the contract, down to the 9th of April, 1892, Hurst had in all things performed his part of the contract, inasmuch as Lovell had enjoyed the exclusive use of the plates down to the latter date, and Hurst had refrained from publishing, as he agreed, any works in competition to those mentioned in the agreement. Hence, by virtue of such

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performance, Hurst had, on the 9th of April, 1892, earned, and had a vested right of action on all of said series of notes maturing prior to April 9, 1892, and then unpaid. None of these were returned at the time of giving the notice; some of them were then in action. Lovell had, in violation of his contract, made default in the payment of eight of the series. In consequence of these repeated defaults on Lovell's part, Hurst was clearly justified, on April ninth, in terminating the contract as to its unexpired part, and in holding Lovell upon his contract and notes given thereunder, for the liability already incurred on his previous defaults. *In re Kelly*, 51 Fed. Rep. 194; *Cunningham* v. *Massena Springs, etc., R. Co.*, 63 Hun, 439, 443; *Strack* v. *Hurd*, 41 N. Y. St. Repr. 777; *Gardner* v. *Clark*, 21 N. Y. 399. In giving Lovell notice of such termination of the contract, Hurst was not confined to any particular form of words so long as their import was to terminate the contract in respect to its unexpired period. If, instead of using the expression "terminate and rescind," Hurst had written that he had terminated the contract as of the date of the notice, or had coupled with the word "rescind," words showing express reservation of his accrued rights, this would have meant simply that he terminated the contract only as to its unexpired period. *McCreery* v. *Day*, 119 N. Y. 1; *Roe* v. *Conway*, 74 id. 201; *Duncan* v. *Ins. Co.*, 46 N. Y. St. Repr. 242. In the light of the surrounding circumstances, has he done anything else than this?

But it is claimed that we must give effect to all the words in the contract. We do this in this case by making the word "rescind" equivalent to the word "terminate," and hence regard it as mere tautology and synonymous with "terminate." The curious in such matters would see in this no more than a survival of that disposition which draftsmen exhibited when the fee bill was in part regulated by the folio, and they became expert in the use of a large vocabulary of words having the same or similar meaning in order to increase the number of folios.

It is quite true, as contended for by the appellant, that as a

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general rule where there has been a breach of a contract, the party performing has the right to consider such breach as a basis for rescinding and abandoning the contract, or to treat the contract as subsisting, and sue for the enforcement of the unperformed obligation, and the election to rescind the agreement bars the pursuit of the other alternative. Yet this is so only in cases where the contract is rescinded *in toto* and *ab initio*. In such cases he cannot regard the contract as existing and not existing at the same time; he must choose between the two. But, as before shown, there are numerous cases in which the party performing the contract on his part, may terminate it as to the future, and still hold the delinquent party for its performance up to the time of its termination. In addition to what has been said, we may call attention to the familiar illustration of an ordinary lease for a number of years, where it is provided that the same shall continue for a definite period of time, with installments of rent to be paid monthly; if the lessee neglects to pay these monthly installments, the landlord may allow the lease to go on to the end, and sue for the whole rent due, or he may at any time by the commencement of summary proceedings, obtain possession of the leased property, and thus terminate the lease, and yet he may thereafter sue the lessee and recover for the rent due up to the time of the dispossession. And we have no doubt whatever but that the contract under consideration falls within the latter class of cases.

Again, all the facts in this case were undisputed. If conflicting inferences were to be drawn from these facts, the action of the parties in requesting the court to direct a verdict, made it the judge of those inferences to the same extent that the jury would have been had not such requests been made; and we think there is quite sufficient in these cases to warrant the judge in drawing the inference as he did in favor of the plaintiff's contention.

But it is claimed on behalf of appellant that even conceding Lovell might be held upon the notes due and unpaid at the time of the rescission, the indorsers were thereby dis-

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charged because of the modification of the contract between Lovell and Hurst, inasmuch as the only liability of the defendants to the plaintiff is as sureties for Lovell, the sole party to the contract. It is difficult to see how a cancellation of a contract is a modification of it. The terms of the contract were in no way changed by such termination, and if Lovell was not discharged from the obligation he incurred before the rescission, we cannot see how his sureties could be. As before shown, all the unpaid notes up to the date of the rescission had been fully earned by Hurst by the performance of the contract on his part, and Lovell had had all the benefits of the contract up to its rescission; and in our opinion the notes were in the nature of rent for the plates, etc., and the defendants were liable for its payment. We fail to perceive any force in the argument that the defendants were injured by such rescission; on the contrary, it appears to us that it was greatly to their advantage, as in consequence of it they were relieved from a large liability, which, if the contract had been allowed to continue, they or their principal, Lovell, would have had to meet, with nonresulting advantage to the indorsers.

The contention that the sureties were released because of an extension of time granted the principal, is not well founded. Such a contention is based solely upon the letters written by the plaintiff to the defendant, which, instead of extending his time to pay the notes, really were intended to press upon him the necessity for immediate payment. The mere failure to sue upon the notes when due never releases the indorser.

The judgment should, therefore, be affirmed, with costs.

BISCHOFF, J., concurs.

PRYOR, J. (dissenting). I am unable to concur in the prevailing opinion.

The notes in suit were given in execution of the agreement of the 15th of June, 1892, but that contract was "rescinded" and "annulled" by the mutual consent of the parties, and by consequence all rights acquired under it ceased and determined. A rescission of a contract imports *proprio vigore* a

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relinquishment of every benefit and a dissolution of every obligation dependent upon it; and by the act of rescission each party is restored to his original position and relation. It is a contradiction in terms to assert a right under a rescinded contract, and "neither party can thereafter invoke it against the other." *McCreery* v. *Day*, 119 N. Y. 1; *Graves* v. *White*, 87 id. 463, 466; *Brewster* v. *Wooster*, 131 id. 473; *Fullager* v. *Reville*, 3 Hun, 600. By rescission of the contract, of which they were an incident, the notes became incapable of enforcement. Otherwise, however, had they been reserved from the operation of the rescission, but of that there is no hint, the words being "*wholly* rescinded and annulled."

Judgment affirmed.

GERARD *v.* COWPERTHWAIT.

(New York Common Pleas — General Term, February, 1893.)

While an appellate court will not as a rule review exceptions taken to mere offers of evidence, yet when from an inspection of the record it appears that they were made in absolute good faith and for the purpose of facilitating the business of the court, and with its sanction and without objection from the other party, the court is justified in departing from the rule and should determine the case upon the exceptions as if they had been to testimony actually offered and excluded.

B., being indebted to plaintiff to the amount of $40,000, insured his life for that amount for plaintiff's benefit and defendant gave plaintiff his bond in the penalty of $10,000, agreeing in consideration of one dollar, the receipt whereof was acknowledged, to pay the premiums on the said policy as they became due. Defendant made default in the payment of a premium and the policy lapsed. In an action on the bond, after plaintiff had rested, defendant offered to prove, (1) that at the time he made and delivered the bond, the plaintiff orally agreed that if defendant would make and deliver to him such bond, he would forbear to take or avail himself of any legal proceedings against B. for the enforcement of any rights or remedies which he had against him by reason of the said indebtedness or any part thereof, or by reason of any matter relating thereto; (2) that plaintiff agreed to forbear so long as defendant continued to pay the premiums mentioned in the bond; (3) that the agreement stated in said offers was the only consideration given for the bond; (4) that at the time of the delivery of the bond no money consideration was given; (5) that before default was made in the payment of the pre-

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miums plaintiff entered judgment by confession against B. for the amount of the said indebtedness. These several offers were rejected, defendant excepted and a verdict for plaintiff for $10,000 was directed. *Held*, no error; (1) the offers tended more to import a new condition into the instrument than to show the consideration thereof; (2) plaintiff was entitled to recover $10,000, the full amount of the penalty of the bond. The court declined to instruct the jury to take into consideration the fact that plaintiff had received a paid-up policy, and, also, declined to charge that plaintiff could recover only the amount of the premiums in default at the time of the enforcement of the action. *Held*, no error.

APPEAL from an order denying a motion for a new trial made after a verdict for the plaintiff by the judge upon the trial of an action by the court with a jury.

Putney & Bishop, for defendant (appellant).

H. Kattell, for plaintiff (respondent).

BOOKSTAVER, J. This action was brought upon a bond given by the appellant which, after the formal parts, recited that one William Boswell was indebted to the respondent in the sum of $40,000 and upwards, and that in order to secure the payment of that sum, Boswell had applied for a policy of insurance to the Equitable Life Assurance Society for $40,000, payable on his death to the respondent, and further recited that "whereas the above bounden Frank H. Cowperthwait has agreed and does hereby agree in consideration of the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, to pay the premiums of insurance on the said policy as the same may become due from time to time." The condition of the bond was that if the appellant should pay the premiums upon the policy as they became due, then the obligation should be void. A number of defenses were set up in the answer, but upon the trial the appellant rested his defense solely upon the ground that the bond was given upon condition, and in consideration, that the respondent would forbear to take or avail himself of any legal proceedings against Boswell for the enforcement of any rights or remedies which he had against him by reason of his indebtedness to

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respondent or by reason of any matter relating thereto. After the respondent had rested, the trial judge, entertaining the opinion that such matters constituted no defense to the bond, permitted the defendant to make offers of proof instead of calling witnesses. Whereupon the defendant offered to prove that at the time he made and delivered the bond, the plaintiff upon his part agreed orally that if the defendant would make and deliver to him such bond, he would forbear to take or avail himself of any legal proceedings against Boswell for the enforcement of any rights or remedies which he had against him by reason of the indebtedness of Boswell to the plaintiff, or any part thereof, or by reason of any matter relating thereto. He also offered to prove that the plaintiff agreed that he would forbear so long as he, the defendant, continued to pay the premiums mentioned in the bond. He also offered to show that the agreement stated in the last two offers was the only consideration given for the bond. He also offered to show that, at the time of the delivery of the bond, no money consideration was given. He further offered to show that, before default made in the payment of premiums, the plaintiff entered up a judgment against William Boswell for the sum of $41,356.36 and docketed the same, the judgment being one entered upon confession. The evidence under each of these offers was rejected and the defendant excepted. The court then directed a verdict for $10,000, with interest, from March 17, 1891, and declined to instruct the jury that they were to take into consideration the paid-up policy received by the plaintiff, and, also, declined to charge that the plaintiff could recover in this action only the amount of premiums in default at the time of the enforcement of the action.

Upon this appeal, the respondent contends that the questions intended to be presented to the court should not be considered, because they are raised by exceptions to the exclusion of offers merely, and are not based upon testimony actually offered and excluded. While it is quite true that this court will not as a rule review exceptions taken to mere offers, yet an inspection of this case convinces us that the offers were

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made in absolute good faith and for the purpose of facilitating the business of the court, and with its sanction, to which the respondent did not at the time raise any objection; hence we think that in this particular case we are justified in departing from the rule, and should determine the case upon the exceptions as if they had been to testimony actually offered and excluded.

At common law, the want of consideration might be shown to defeat a recovery on all executory instruments not under seal, whatever might be the recitals contained therein. *Anthony* v. *Harrison*, 14 Hun, 198; 74 N. Y. 613. By the Revised Statutes, part 3, chapter 7, articles 8, 77, original edition, it was provided that "In every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed." But in *Calkins* v. *Long*, 22 Barb. 97, it was held that this only applied to actions and set-offs founded on the sealed instrument. This rule of law was extended by section 840 of the Code of Civil Procedure, which provided that "a seal upon an executory instrument hereafter executed is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed." Indeed, before the passage of this provision of the Code, and as far back as 1836, in the leading case of *M'Crea* v. *Purmort*, 16 Wend. 460, it was decided that the consideration clause in a deed, that is, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer, was open to explanation by parol proof; and in that case it was decided that although the consideration in a deed conveying land was expressed to be money paid, it could be shown by parol evidence that the consideration, instead of money, was iron of a specified quality valued at a stipulated price. And under many decisions since then, it has been established beyond controversy that the consideration clause of an executory contract may always be inquired into, whether

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under seal or not. The only difference between written contracts, as far as the consideration clause is concerned, being that where they are under seal there is presumption of consideration which may be rebutted or overcome; but if the contract is not under seal, then the plaintiff must affirmatively establish the consideration *aliunde* the writing. *Vanderbilt* v. *Schreyer*, 91 N. Y. 399; *Home Ins. Co.* v. *Watson*, 59 id. 390; *Best* v. *Thiel*, 79 id. 15; *Presbyterian Church* v. *Cooper*, 112 id. 517; *Parkhurst* v. *Higgins*, 38 Hun, 113.

But it is also as well settled, and just as fundamental and familiar a rule of law in this state, that if a paper appear on its face to be a complete contract, then in the absence of fraud, accident or mistake, parol evidence is inadmissible to enlarge its terms, the conclusive presumption of law being that such paper embodies the entire agreement of the parties, and whether or not the writing upon its face be a complete expression of the parties, is for determination by the court. *Lamson Con., etc.*, v. *Hartung*, 18 N. Y. Supp. 143; *S. C.* reargued, 19 id. 233; *Harrison* v. *McCormick*, 89 Cal. 327; *Thomas* v. *Scutt*, 127 N. Y. 133; *Eighmie* v. *Taylor*, 98 id. 288; *Dent* v. *S. S. Co.*, 49 id. 390; *Seitz* v. *Machine Co.*, 141 U. S. 510. In the latter case, FULLER, Ch. J., stated the rule as follows: "Undoubtedly the existence of a separate oral agreement as to any matter on which the original contract is silent, and which is not inconsistent with its terms, may be proved by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, *but must relate to a subject distinct from that to which the contract applies;* that is, it must not be so closely connected with the principal transaction as to form a part and parcel of it. When the writing itself upon its face is concluded in such terms as import a complete legal obligation without any uncertainty as to the object and extent of the engagement, it is conclusively presumed that the whole engagement of the parties and

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the extent and manner of their undertaking was reduced to writing."

The question, therefore, to be determined in this case is whether the offers made by the appellant upon the trial related to the *consideration* of the instrument merely, or whether under color of inquiring into such a consideration was really intended to add another term to the contract itself, and one which, if established, would render the writing imperative. On looking at the instrument it is apparent that it contains every essential of a complete undertaking to do a specific act without any other condition than that expressed therein. It recites the indebtedness of Boswell to Gerard, and declares that the object of procuring the policy of insurance was to secure the payment of that indebtedness; and the appellant undertook in consideration of the sum of one dollar to him in hand paid, the receipt whereof was acknowledged, to pay the premiums of insurance on the policy as the same became due from time to time. It is manifest, therefore, that the appellant knew of the indebtedness and knew that the obligee had a perfect right at any time to pursue all legal methods, civil or criminal, for the enforcement of his just debt. If he had intended to pay the premiums only in case the obligee forebore to exercise his legal rights, it is clear that he should have made that a condition of his agreement and not rested upon a parol promise of the obligee not to pursue his legal remedies. To permit him to show that now, would be to introduce a new term in the agreement between the parties, and that as appellant himself contends, in order to render it completely inoperative. We think the offers savored much more of an attempt to import a new condition into the instrument, than to show the consideration thereof. That this is so, we think will be clearer from an illustration: Suppose that A. desires to provide for the support of B, a widow, during life or widowhood, and to this end enters into an agreement in writing with C. that he will pay a certain sum monthly for the support of B. during life. If B. should thereafter marry, could it be contended that A.

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could show by parol that one of the terms of the contract was that he should only pay C. during widowhood. But in the case under consideration the appellant undertakes to pay the premiums upon the policy upon Boswell's life as they fall due, and the only condition he provides for in the bond to render it inoperative, is that he shall pay or cause to be paid to the insuring society, the just and full sum of the amount of any premium or premiums which may become due at any time or times thereafter. If the defendant desired to render the instrument void upon the condition that the obligee was not to take legal proceedings, then he ought to have so provided in the condition or in the recitals or other part of the bond. But such a condition is nowhere hinted at, and we think the offers were, therefore, properly excluded. *Cocks* v. *Barker*, 49 N. Y. 110; *Worrall* v. *Munn*, 5 id. 229; *Gilbert* v. *North American F. Ins. Co.*, 23 Wend. 43. In *Wilson* v. *Deen*, 74 N. Y. 531, which was an action brought by a lessee and her surety against a lessor to obtain the cancellation of the lease, which contained no covenant as to additions to the furniture which was known to the lessee when she signed it and which the lessee upon the execution of the lease promised to complete but neglected to do, the court refused to cancel the lease, and RAPALLO, J., in rendering the decision said: "Both at common law and in equity, one who sets his hand and seal to a written instrument knowing its contents cannot be permitted to set up that he did so in reliance upon some verbal stipulation made at the time relating to the same subject and qualified or varying the instrument which he thus signs," citing *Coon* v. *Knap*, 8 N. Y. 405.

As before shown, either party is at liberty to show for any purpose, except to prevent its operating, whether the writing is under seal or not, that its consideration was different greater or larger than that named in it, or not wholly or at all pecuniary, in a suit by the vendor against the vendee to recover the actual consideration agreed to be paid, or in a suit brought by the vendee against the vendor on the covenants of a seizin or against incumbrances. *Bingham* v. *Weiderwax*, 1 N. Y.

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514; *Barker* v. *Bradley*, 42 id. 320. Where a receipt is part and parcel of a contract, it cannot be contradicted to defeat the contract itself. *Wood* v. *Chapin*, 13 N. Y. 517. And in *M'Crea* v. *Purmort*, 16 Wend. 460, it was held that a mere receipt can be inquired into because it is only evidence of the fact of payment; but where the acknowledgment of a receipt of the consideration is part of the instrument which is used to prove a right vested, created or extinguished, no evidence can be admitted which will prevent the operative effect of the contract. See, also, *Halliday* v. *Hart*, 30 N. Y. 474; *Marsh* v. *McNair*, 99 id. 180; *Hinckley* v. *New York Central, etc., R. Co.*, 56 id. 429; *Engelhorn* v. *Reitlinger*, 122 id. 76. In *Marsh* v. *McNair*, 99 id. 180, it was claimed that a certain assignment was in fact given as collateral security for an indebtedness, but it was held that in the absence of any claim of fraud or mutual mistake as to the contents of the assignment, the plaintiff was concluded thereby, and oral evidence was incompetent to show that it was executed as collateral security merely. And in the course of his opinion, EARL, J., said: "It is believed that no case can be found where parol evidence has been received for the purpose of showing that such an instrument was given merely as collateral security and not for the precise purpose mentioned in it." Citing cases. And in *Coon* v. *Knap*, 8 N. Y. 405, it was held that a receipt may be explained as to the consideration part when the explanation is not contradictory to but consistent with the instrument. When a receipt is in the nature of a contract, it falls within the general rules applicable to contracts.

In a number of the cases cited by the appellant, there was either no consideration expressed in the instrument itself, or the seal was relied upon as importing a consideration, or a guarantee or other matter was incorporated into another instrument but not essential to the validity of that instrument, as in *Vanderbilt* v. *Schreyer*, 91 N. Y. 392. *Parkhurst* v. *Higgins*, 38 Hun, 113, was an action to foreclose a mortgage conditioned for the payment of a sum of money which was stated in the mortgage to be for the purchase money of the

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premises described therein; this statement was found to be without foundation in fact, and it was also found that at the time of the execution of the instrument there was an agreement that it should have no validity or effect and should never be collected. These facts were proved by the declarations of the parties, and the question upon the appeal was whether or not such declarations were properly admitted in evidence, and the judgment was upheld upon the ground that they were, and we do not think it touches the question under consideration. *Presbyterian Church* v. *Cooper*, 112 N. Y. 517, related to a subscription paper to pay off the mortgage debt of a church. So far as appears from the report of the case, the instrument was not under seal and nowhere in the course of the opinion is that fact discussed or even alluded to.

We, therefore, think the learned judge who tried the case below committed no error in excluding the testimony offered by the appellant, and that he properly directed judgment in favor of the plaintiff.

But even if the offers had been accepted, the only breach of the condition which might possibly have been established by them which was attempted to be shown, was that after the bond had been executed and certain premiums paid, the plaintiff docketed a judgment against Boswell for the sum of $41,356.36 upon the latter's confession. This confession was the act of Boswell and not of the respondent, and it may be well questioned whether such an act would have amounted to a breach of the condition if established.

But appellant contends that even if judgment was properly directed in favor of the plaintiff, it was for too large an amount, and should have been for the sum of $1,458.40 only, being the amount of the premium which became due March 17, 1891. But the bond was conditioned upon the appellant's "paying the amount of any premium or premiums which may become due at any time or times hereafter upon the above-mentioned policy with the times required or to be required by the rules of said society; should the said William Boswell comply fully with all requirements and conditions of said

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policy of insurance, then that the above application to be void, otherwise to remain in full force and virtue." This was an entire contract of which there was a total breach by reason of the nonpayment of the premium, and, therefore, full and final damages are recoverable. *Schell* v. *Plumb*, 55 N. Y. 592. In that case the contract was to support plaintiff during her life, and the court said "that was a continuing contract during that period, but the contract was entire, and the total breach put an end to it and gave plaintiff the right to recover an equivalent in damages, which equivalent was the present value of the contract." *Shaffer* v. *Lee*, 8 Barb. 412, was cited in that case, where there was a bond to furnish obligee and wife with necessary meat during their lives, wherein it was held there was an entire contract and a failure to provide caused a total breach, and that full and final damages might be recovered for the future as well as the past. See, also, *Dresser* v. *Dresser*, 35 Barb. 573; *Wakeman* v. *Wheeler & Wilson Manfg. Co.*, 101 N. Y. 205.

In this case Cowperthwait agreed to pay the premiums on the policy of insurance described in the bond when they became due. He failed to pay the March premium, and the policy in consequence of that failure lapsed and was void. No premium could become payable thereon at any time thereafter. The breach of the contract on his part was of necessity total, and the plaintiff must recover in this action his full and final damages. Besides, the loss of the policy was the natural and approximate result of the failure of the appellant to pay the premium. Had he done so the policy would now be alive; it became inoperative on his failure to pay the March premium. In such case the damages are the value of the policy. *People* v. *Security, etc., Co.*, 78 N. Y. 114. The appellant had full knowledge of the special circumstances affecting the question of damages and that his breach would cause the policy to lapse, and we must, therefore, infer that the contract was entered into upon the basis of these facts and that the parties had contemplated them in fixing the amount of the damages defendant was to pay at $10,000. *Booth* v. *Spuyten Duyvil Roll-*

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ing Mill Co., 60 N. Y. 487; *Grindle* v. *Eastern Express Co.*, 67 Me. 317. The direct consequences of a breach of contract are always compensated, and here they were the loss of the policy. *Eten* v. *Luyster*, 60 N. Y. 252; *Starbird* v. *Barrows*, 62 id. 615; *Devlin* v. *Mayor, etc.*, 63 id. 25; *Ward* v. *New York Central R. Co.*, 47 id. 32.

The value of the policy at the time of the default was such sum as it would cost to replace it, hence the exception to the question "what would have been the charge for a paid-up policy of $40,000 on the life of Boswell at that date" was not well taken, and as the answer shows that it was much larger than the amount of the verdict directed, the appellant was not in any way injured thereby even if it were erroneous. The instrument is not one of indemnity, but a bond by which the defendant bound himself to do certain acts, to wit, to pay premiums on the policy as they should become due. To such a bond *nondamnificatus* cannot be pleaded. *Gilbert* v. *Wiman*, 1 N. Y. 550; *Rector, etc.*, v. *Higgins*, 48 id. 532; *Seligman* v. *Dudley*, 14 Hun, 186; *Belloni* v. *Freeborn*, 63 N. Y. 383; *Kohler* v. *Matlage*, 72 id. 266.

The court did not err in refusing to deduct the amount of the paid-up policy from the verdict directed against the defendant, as after the deduction the damage to the plaintiff was much more than the entire face of the bond.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

Daly, Ch. J., and Bischoff, J., concur.
Order affirmed.

Young v. Young.

(New York Common Pleas — General Term, February, 1893.)

One Y. died in 1867, leaving a will by which he gave to his wife for life, all his estate, real and personal, and after her death he gave the same to his children, one of whom was plaintiff. In an action brought against the widow for a general accounting, plaintiff objected to the item of funeral expenses, the cost of a burial plot and of a monument erected

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thereon, for the reason that they were not proper charges against the real estate and could not be made a lien thereon. The evidence showed that all of these expenses were assented to by plaintiff at the time they were made; his objections were overruled. *Held*, proper; that plaintiff should not be allowed to repudiate his consent to the purchases in question, but even if he could, the whole estate, real and personal, is subject thereto if reasonable, as such were found to be by the trial court.

Plaintiff further claimed that those expenses should not have been allowed because the Statute of Limitations ran against them. *Held*, not tenable; the accounting is in regard to trust funds, and in such proceedings the Statute of Limitations are not known.

Plaintiff also contended that those charges should not have been allowed as against the real estate because there was no order made by the proper court directing such sale. *Held*, not tenable; that from the evidence it appears that the personal property was not sufficient to pay the debts, and inasmuch as all the parties to the action had consented to the sale of the real estate without any order the proceeds of such sale should be so far regarded as personalty as to authorize a court of equity to direct the allowance in question out of such proceeds.

APPEAL from a judgment of the equity term of this court. The opinion states the case.

E. F. Bullard, for plaintiff (appellant).

Robert E. Deyo, for defendant (respondent).

BOOKSTAVER, J. John Young died in New York city July 22, 1867, leaving a will, by which he gave to the respondent Sophia Young, his wife, all his real and personal estate to use and enjoy during her life, and after her death he gave the same to the plaintiff and the defendant, Maria Louise Guth, his children, share and share alike. The plaintiff brought this action for an accounting, the demands for relief being, first, that there should be an accounting, and, second, that a receiver of the fund be appointed. After the court heard the evidence the plaintiff presented requests for findings, many of which were refused, but no exception was taken to any such refusal; consequently, this appeal is limited to a consideration of the exception to the findings of fact and conclusions of law made by the court and exceptions to the admission of evidence.

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The first question raised by the appeal is whether or not the court erred in allowing to the defendant the funeral expenses and the cost of a burial plot and of a monument erected thereon. The appellant contends that none of these are charges against the real estate and could not be made a lien thereon, and, therefore, were improperly allowed. The first answer to this contention is that the court has found, and we think upon sufficient evidence, that all of these expenses were expressly assented to by the plaintiff at the time they were made, and he cannot now come in and repudiate that consent. But even if he could, we think the court properly allowed these expenses, for the whole estate, personal and real, is subject to the debts of the decedent, and such expenses as those under consideration, if reasonable, stand on even better footing than the debts contracted by the decedent, and in some instances have been allowed even where the estate is insolvent. *Cornwall* v. *Deck*, 2 Redf. 87; *Owens* v. *Bloomer*, 14 Hun, 296; *Tickel* v. *Quin*, 1 Dem. 425. Much more will they be a charge where the estate is not only solvent but of considerable amount. *Patterson* v. *Patterson*, 59 N. Y. 574; *Ex parte Frazer*, 92 id. 239; Redf. Surrogate's Prac. 441.

The only question to be raised in regard to either the funeral expenses or the monument, therefore, is whether or not they were reasonable under the circumstances, and considering the decedent's station in life and the estate left by him. Inasmuch as the learned trial judge has, by allowing these items, found that they were not excessive, we see no reason for questioning that conclusion, especially in view of the fact that these expenses were assented to by the plaintiff at the time they were made. But it is claimed by the appellant that they ought not to have been allowed because the Statute of Limitations ran against them. This leaves out of sight the fact that this was a general accounting of both real and personal estate from the time the trust was created down to the time of trial, and as far as we are aware, there is no Statute of Limitations on such an accounting, and if there

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were, it would work more strongly against the appellant in this case than against the respondent.

It is also contended that these charges should not have been allowed as against the real estate because there was no order made by the proper court directing such sale. But it is clear from the case that the personal property was not sufficient for these purposes, and inasmuch as all the parties to this action had consented to the sale of the real estate without any order of the court, we think that the proceeds of such sale could be so far regarded as personalty as to authorize a court of equity to direct the allowance of these expenses out of such proceeds.

The exceptions to the admission of evidence were not argued before us at any length, nor has the appellant made any point upon those exceptions, except the general one that the court erred in overruling the objections and admitting evidence. Under such a general point we would not ordinarily feel that we were required to examine them, but in this case we have done so with some care and we find that the exceptions were not well taken. The husband of one of the heirs was asked, "Was there any personal property left by John Young?" This was objected to, excluded and exception taken by appellant. The question was, in our judgment, proper; the action was for a general accounting; such an accounting covers not only all the receipts from the real estate but also all the personal property, for the income of both was left to the widow; hence it was proper to show and settle in this suit just what was the personal property of the deceased which came into the hands of the executor.

The question as to the amount of the funeral expenses was also objected to, but it was clearly permissible for the reasons above stated. The objection that the funeral expenses were no lien upon the real estate was, as before shown, not well taken. And the same applies to evidence in regard to the monument and burial plot.

We cannot perceive the force of the objection in regard to the testimony to all the real estate, or why appellant should have desired to limit it to three of the five parcels only, and

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he has not deigned to enlighten us by anything said in his points or during the course of his argument.

The judgment should, therefore, be affirmed, with costs.

DALY, Ch. J., and PRYOR, J., concur.

Judgment affirmed.

HAINES *v.* THOMPSON.

(New York Common Pleas — General Term, February, 1893.)

Plaintiff, an actress, was employed by defendant under an oral contract in June, 1888, "for thirty-five or forty weeks, perhaps a year," services to commence in August, 1888 *Held*, that no obligation was thereby created to continue the employment for a year, and hence the contract was not within the Statute of Frauds and was not required to be in writing.

Plaintiff brought action for a breach of contract, and on the trial it appeared that she was discharged upon a previous notice of two weeks. Her complaint alleged that she was employed for the season, commencing on or about August 23, 1888, and ending on or about June 1, 1889, and that she was wrongfully discharged. Defendant testified that at the time of making the contract he said to plaintiff, "You must become engaged here like all the rest of the company, two weeks' notice either side," and further that the phrase "two weeks' notice either side" had a well-known meaning in the theatrical profession. The question "What does it mean?" was excluded on the ground that the right to terminate the employment upon two weeks' notice was not specifically pleaded by the answer, which was a general denial. *Held*, error; that under the defendant's answer he should have been permitted to have given in evidence anything that disproved the allegations of the complaint.

APPEAL from a judgment of the General Term of the City Court of New York, affirming a judgment for plaintiff, which was entered upon a verdict, and affirming also an order refusing a new trial.

Action to recover damages for defendants' breach of a contract for the employment of plaintiff's services as an actress, by her alleged wrongful discharge.

David Gerber, for plaintiff (respondent).

Edward Brown, for defendants (appellants).

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BISCHOFF, J. An order of the City Court of New York which refuses a new trial is not appealable to this court. Code Civ. Proc. § 3191; *Wilmore* v. *Flack*, 96 N. Y. 512; *Smith* v. *Pryor*, 16 Daly, 169.

The contract of employment was made in June, 1888, the services thereunder to commence on the twenty-third day of August following. It was oral, and construing the evidence most favorably for defendants, was to the effect that the employment should endure for "thirty-five or forty weeks, perhaps a year." No obligation was thereby created to continue the employment for a year, and hence the contract was not within the Statute of Frauds, and was not required to be in writing. *Blake* v. *Voight*, 134 N. Y. 69.

But we are of the opinion that the trial court erroneously excluded evidence offered by defendants, which tended to show that the words "two weeks' notice on either side" had a definite and well-understood meaning in the making of contracts for theatrical services, and that plaintiff so understood them. In *Hannay* v. *Zerban*, 16 Daly, 372, we held that parol evidence of the meaning of a somewhat similar phrase was inadmissible to add to the contract. But that was the case of a written contract, and so is inapplicable here. Nor was the error excluding the evidence in the present case cured, because defendant Ryer was subsequently permitted to testify to his own understanding of the phrase, since that did not show plaintiff's understanding of it; or because the court charged the jury that "defendant testifies positively that he told her (plaintiff) it was on two weeks' notice. If you find that to be so, of course you find that that was the contract, not a custom." No evidence which tended to show that plaintiff understood the phrase in any particular sense was permitted to go to the jury.

It appeared on the trial from her own admission that plaintiff was discharged upon a previous notice of two weeks. The complaint alleged that plaintiff was employed for the season commencing on or about August 23, 1888, and ending on or about June 1, 1889, and that she was wrongfully discharged.

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The answer denied this. Defendant Ryer, with whom the contract was made, testified that at the time of making it he said to plaintiff, "You must become engaged here like all the rest of the company, two weeks' notice either side." He further testified that the phrase "two weeks' notice either side" had a well-known meaning in the theatrical profession and the question "What does it mean?" was excluded on the the ground that the right to terminate the employment upon two weeks' notice was not specifically pleaded by the answer.

It is, however, a well-settled rule of pleading that under a denial the defendant will be permitted to give in evidence anything which disproves the allegations of the complaint (*O'Brien* v. *McCann*, 58 N. Y. 373), and by showing what the contract really was, that it was not as alleged in the complaint. *Marsh* v. *Dodge*, 66 N. Y. 533; *Bien* v. *Abbey*, 36 N. Y. St. Repr. 791; *Wheeler* v. *Billings*, 38 N. Y. 263; *Hier* v. *Grant*, 47 id. 281. Evidence that "two weeks' notice either side" was part of the contract tended to disprove that the contract was as alleged in the complaint, and evidence that this phrase was understood by both parties to mean that either party was at liberty to terminate it upon two weeks' previous notice to the other certainly tended to disprove the alleged breach of contract on defendant's part, the wrongful discharge of the plaintiff. The attempted proof of the meaning of the phrase "two weeks' notice either side" was not to show that there was a custom in the theatrical profession whereby either of the parties could upon two weeks' notice to the other terminate any contract; but that, if defendant's version of the contract be true, a seemingly obscure part of it was understood by both contracting parties in a particular sense. The evidence offered and excluded thus tended to establish an integral part of the contract.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellants to abide the event.

Daly, Ch. J., and Pryor, J., concur.

Judgment reversed and new trial ordered.

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HYMAN *v.* HAUFF.

(New York Common Pleas — General Term, February, 1893.)

Mortgages for future advances on the same property, each containing a provision allowing the mortgagee to discontinue his advances at his option will prevail over supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgages, whether made before or after the claim of such purchaser or creditor arose, or before or after the mortgagee had notice thereof.

No one but parties to a contract can take advantage of a breach of its condition, and the rights and liabilities are confined to them and their privies.

Parties to a mortgage may by agreement extend payment without losing priority over inferior lienors.

Unsuccessful claimants of surplus moneys on foreclosure will be charged with the expenses of the reference.

APPEAL by James Rogers, a claimant, from an order made at Special Term, confirming the report of a referee, directing the distribution of surplus moneys, and also charging him with the expenses of the reference.

Vedder Van Dyck, for defendant Rogers (appellant).

Tallmadge W. Foote, for defendants Lee and others (respondents).

Thomas C. Ennever, for defendants Cassidy and another (respondents).

BOOKSTAVER, P. J. In December, 1890, Muller & Hauff, the owners of seven lots of land, subject to mortgage, commenced to construct seven buildings thereon. They first made a mortgage to the plaintiff to secure moneys to be advanced upon the buildings as they progressed. Then they made contracts with various parties for furnishing materials and work upon the houses, among others, first, with the Lorillard Brick Works Company, for supplying brick; second, with the Buffalo Door and Sash Company, for supplying woodwork and trim; third, with Cassidy & Adler, for plumbing work; and, fourth, with Michael McCormack, for plastering. To secure

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these contracts, they made their bonds to each for the amount of their several contracts, and gave mortgages upon the buildings to be erected, to secure the same. The mortgages were recorded in the order of their making. On this proceeding, each of these claims was proved and found by the referee to be due; and the sole question raised on this appeal is whether or not the defendant Rogers had a right to share with the Buffalo Company and with Cassidy & Adler in the $4,000 balance of surplus remaining in court after payment, under the order of October 26, 1892, of the costs of reference, and $12,200 to the Buffalo Company, and $4,596.02 to Cassidy & Adler on account of their claims.

The facts relating to this question are as follows: The Buffalo Company's mortgage was dated December 16, 1890, and was recorded December 22, 1890; it was given nominally to secure a bond of even date, but in reality to secure their contract with Muller & Hauff for payment of doors, sash and other trim for the seven houses; the contract provided that the company was to be paid the amount of the contract in seven payments; the first, second, third, fourth and fifth of which were to be $1,100 each in cash, when materials to the amount of said payment should have been delivered, and the sixth by a payment of $4,700 in cash, on or before March 16, 1891; and the further sum of $6,500 on a bond and mortgage upon three of the completed houses when the proposed permanent loan was secured, whereupon the mortgage under consideration was to be canceled. The seventh clause of this contract contained the following provision: "It is further agreed that in case any lien or incumbrance of any kind shall be filed or docketed against or placed upon the said premises, or any part thereof, during the performance of this contract, the parties of the first part, may, at their option, cease to deliver materials hereunder, and unless such lien or incumbrance shall be discharged of record within ten days, the said bond and mortgage shall thereupon become due and payable to the extent of the materials which shall then have been delivered."

The claim of the plaintiff is based upon two mortgages for

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$1,500 each given by Muller & Hauff to Michael McCormack to secure the payment for materials and work to be furnished and performed by McCormack on the mortgaged premises, which mortgages were assigned by McCormack to Rogers by an assignment recorded February 20, 1891, one of which covered the easterly seventy-five feet of the premises out of which the surplus arose, and the other the westerly one hundred feet of said premises. The first of these mortgages contained the following clause: "Subject, however, to prior mortgages covering the said premises and the four lots on the westerly side thereof not exceeding in the aggregate the sum of $144,700;" and the second containing the following clause: "Subject, however, to prior mortgages now thereon (which mortgages also cover the three lots on the easterly side of said premises), not exceeding in the aggregate the sum of $144,700." At the time of the execution and delivery of these mortgages the premises affected thereby were subject to mortgages amounting in the aggregate to $139,700 on the three houses and lots, and $143,700 on the four houses and lots, being less by $1,000 than the amount mentioned in the McCormack mortgages. After proceeding for a time, the Buffalo Company suspended deliveries under their contract because of the filing of certain liens against the premises and declined to proceed further until those liens were subordinated to theirs. Thereafter all of these lienors, including McCormack, signed an agreement subordinating their liens to the Buffalo Company's mortgage, but at that time his mortgage had been assigned to Rogers, the appellant herein, and the assignment duly recorded. The referee finds as a fact that the Buffalo Company thereafter duly performed all the conditions of the contract on their part and carried it to completion.

But appellants contend that, notwithstanding this, inasmuch as at one time there had been a determination on the part of the Buffalo Company not to continue the contract, and that by reason thereof the McCormack lien came in ahead of what was done after that time. The first answer to this is that no one but parties to the contract can take advantage

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of a breach of condition, and the rights and liabilities are confined to them and their privies. The well-recognized exceptions to this rule, which permit strangers to have standing in court, do not cover this case. *Lawrence* v. *Fox*, 20 N. Y. 268; *Gibert* v. *Peteler*, 38 id. 165. When such stranger does not change his position, and his rights as originally existing have not been prejudiced by a breach of the conditions of such contract, he will not be heard to complain of such breach when the party for whose benefit the covenant was made chooses not to take advantage of it. But even if the junior incumbrancer has such a stand as to the contract as to raise this question, still the finding must be against him, because both McCormack and Rogers are precluded from raising it, for the reason that the McCormack mortgages assigned to Rogers were in terms taken, given and transferred subject to the Buffalo Company and the Cassidy & Adler lien, amounting in the aggregate to the sum of $24,200; for, as before stated, the McCormack mortgages contained a claim subjecting them to prior mortgages not exceeding $144,700, which includes the two before mentioned. And this, we think, must be regarded as an express assent to the lien of these two mortgages independently of the subsequent agreement of subordination. Besides, the McCormack mortgage was made and filed subsequent to the Buffalo Company's and Cassidy & Adler mortgages. In any event, there was an actual waiver by Muller & Hauff of any election to call the principal or any part of the Buffalo Company's mortgage due; they alone had the right to elect whether or not the Buffalo Company's mortgage should become due on cessation of delivery, and if this election had been made, they had a right to waive such election, and having done so, the subsequent mortgagees cannot complain. This being the case, there can be no doubt that the owners of the equity of redemption would have been estopped from raising the claim now made by Rogers, and we think if it is estopped by it, as he is privy with Muller & Hauff, he also will be estopped. Parties to a mortgage may by agreement extend payment without losing

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priority over inferior lienors. In Jones on Mortgages (4th ed.), section 373, the learned author says: "Notwithstanding all the distinctions and refinements which have been introduced into the law of this subject by the many conflicting adjudications upon it, there is strong reason and authority for the rule that a mortgage to secure further advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may, by ordinary diligence, ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and *whether the mortgagee be bound to make the advances or not*, will prevail over the supervening claims of purchasers or creditors as to all advances made within the terms of such mortgage, *whether made before or after the claims* of such purchaser or creditor arose, or before or after the mortgagee had notice of them." Pomeroy, in his Equity Jurisprudence, section 1199, citing the cases of *Witczinski* v. *Everman*, 51 Miss. 841, and other cases, says that "they maintain the mortgagee's supremacy and preserve the lien of his mortgage against intervening subsequent incumbrances, even for advances made after receiving actual notice of such incumbrances. This conclusion is based upon the doctrine that the executory agreement of the mortgagee creates a full and perfect lien in equity effectual against all persons who are charged with notice thereof, and that the record of the mortgage furnishes such a notice affecting all subsequent incumbrances." And in a note to the same section he says: "I would venture to express the opinion that they are based upon the true principle, and formulate the correct doctrine involved in and derived from the generally-accepted construction of the American Recording Acts." Indeed, any other rule would work inextricable confusion where there were several mortgages for future advances on the same property, each containing a provision for allowing the mortgagee to discontinue his advances at his option, for the contention in such cases would be changed from the time of making and recording the liens to when the goods were actually delivered, and one would have to keep an

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account of the day, hour and minute of each delivery, and we would have a cartload of doors and sashes take precedence over a cartload of brick, or *vice versa*, and so on throughout the entire time of the performance of the contracts. This would be intolerable, and would keep the courts constantly busy settling such controversies between rival claimants.

But again, neither Rogers nor McCormack changed their position on the faith of the conduct of the parties at the time of or subsequent to the alleged discontinuance or election, nor were their rights in any way prejudiced thereby, as they intended to and did take subject to the Buffalo Company's lien as well as the Cassidy & Adler lien to their full amounts respectively.

Finally, it appears that McCormack in April, 1891, entered into an agreement with the Buffalo Door and Sash Company, subordinating his two mortgages to theirs. It is claimed, however, that this agreement was of no effect, because at the time it was made McCormack had already assigned his two mortgages to Rogers, the claimant herein, and they were then held by him. The Buffalo Door and Sash Company, however, had no actual notice of this assignment, and the record of the assignment was not notice to them. *Ackerman* v. *Hunsicker*, 85 N. Y. 43. The assignment, moreover, was not absolute, but as collateral security. The agreement, therefore, with McCormack, subordinating his mortgage to theirs, he being the apparent owner of the mortgages and the equitable owner as well, and the Buffalo Door and Sash Company having no notice of the assignment to Rogers, was binding. Besides, the priority of the McCormack mortgage is technical and has no equity to support it. Every dollar of advance made by the Buffalo Company under their mortgage was in material which actually went into the construction of the buildings upon the mortgaged premises and increased their value, as must have been contemplated by McCormack when he took his mortgages subject to the prior mortgages. The advances made by them, therefore, actually produced this surplus as far as they went, and equity requires that such surplus should be applied to repay those advances rather than to

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pay a claim subsequent in date, inferior in legal rank and which has no superior equity to commend it.

Rogers specifically appeals from that portion of the order which directs him to pay to Cassidy & Adler $563.62, the amount of the referee's fees and disbursements. This it had power to do. *Lawton* v. *Sager*, 11 Barb. 349; *Bevier* v. *Schoonmaker*, 29 How. 411–422; *Hall* v. *MacDonald*, 105 N. Y. 667. There is no opinion as to this last case, but it was an order affirming the order of General Term of this court which directed the unsuccessful claimant to pay expenses of the reference.

In this case if the appellant is not charged with the costs of the contest before the referee, we will in effect charge the successful party with the costs of the litigation, which would be inequitable.

The order should, therefore, be in all respects affirmed, with costs of this appeal.

Bischoff and Pryor, JJ., concur.

Order affirmed.

The State Bank of Rock Valley *v.* Andrews.

(New York Common Pleas—General Term, February, 1883.)

The charter of a domestic corporation provided among other things that "every director shall be personally liable for all debts incurred by the corporation during his administration to an amount not exceeding $5,000." *Held*, that a director's liability to a creditor thereunder is enforceable in an action at law without joining other creditors or directors; that the prior recovery of a judgment against the company and return of execution issued thereunder, were not essential to the maintenance of the action.

Appeal from a judgment of the General Term of the City Court of New York, affirming a judgment for plaintiff entered upon the decision of a demurrer to the complaint.

Action by a creditor of the American Loan and Trust Company to recover the amount of his demand of the defendant, a director, under a provision of the charter of the company that "every director shall be personally liable for debts incurred

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by the corporation during his administration to an amount not exceeding $5,000."

Marshall P. Stafford, for plaintiff (respondent).

James W. Hawes, for defendant (appellant).

BISCHOFF, J. The complaint alleges that plaintiff is a corporation created under the laws of the state of Iowa, and that the American Loan and Trust Company was chartered by the legislature of the state of New York; that the latter corporation is indebted to the former for money deposited, which it failed to repay after due demand, in the sum of $1,478.13; that the American Loan and Trust Company has suspended business and been placed in the hands of a receiver for liquidation and dissolution; that its charter among other things provided that "every director shall be personally liable for all debts incurred by the corporation during his administration to an amount not exceeding $5,000;" and that defendant continued to be a director when the corporation's indebtedness to plaintiff was incurred. To this defendant demurred, alleging as grounds thereof, that the court below was without jurisdiction of the subject-matter of the action; that there was a defect of parties plaintiff and defendant, and that the facts were insufficient to constitute a cause of action. Plaintiff had judgment on the demurrer, which was sustained at General Term in the court below.

Bank of Poughkeepsie v. *Ibbotson*, 24 Wend. 473, is to the effect that an action at law to recover the amount of his demand may be maintained by a single creditor against a single stockholder to enforce the latter's liability under a statute which provides that for all debts due and owing by the corporation at the time of its dissolution the persons composing it shall be individually responsible to the extent of their respective shares of stock, and is, therefore, decisive of the questions presented on this appeal concerning the jurisdiction of the court below and the nonjoinder of parties plaintiff and defendant.

The liability imposed upon defendant by the charter of the

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American Loan and Trust Company is in all respects similar to that enforced in *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473, and there is an obvious distinction between that case and the class of cases relied on by the appellant. *Hornor* v. *Henning*, 93 U. S. 228; *Anderson* v. *Speers*, 21 Hun, 568. In the last-mentioned cases the liability of the stockholder or officer of a corporation for its debts extended only to the excess of liabilities over and above the assets, the amount of which was ascertainable only by means of a discovery and an accounting, remedies which are peculiar to courts of equity.

The allegations of the complaint are claimed to be defective for the purposes of a cause of action because of the omission to recite that judgment was recovered against the American Loan and Trust Company for its indebtedness to plaintiff, and the issue of execution thereunder; but counsel for appellant does not refer us to any need for these recitals. Nor do the cases cited by him to sustain this ground of demurrer (*Stephens* v. *Fox*, 83 N. Y. 313; *Allen* v. *Clark*, 108 id. 269) so hold. The decision in both cases was not that the recovery of judgment against the corporation for the amount of its indebtedness is essential to the maintenance of an action to enforce the stockholders' or officers' statutory obligation, but that such a judgment is admissible in evidence, and constitutes *prima facie* evidence of the indebtedness. If defendant's liability, as in *Hornor* v. *Henning*, 93 U. S. 228, and *Anderson* v. *Speers*, 21 Hun, 568, extended only to the excess of the corporation's liabilities over and above its assets, it might be construed as a security only for the payment of debts, and the need for the recovery of judgment and execution thereunder, wholly or partly unsatisfied, be existent to prove the corporation's default. As it is, the defendant is liable as an original debtor. *Wolverton* v. *Taylor*, 28 Am. & Eng. Corporation Cases, 647.

The judgment appealed from should be affirmed, with costs.

Bookstaver and Pryor, JJ., concur.

Judgment affirmed.

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Carroll v. Tucker.

(New York Common Pleas — General Term, February, 1893.)

In an action for broker's commission on a sale of realty, it appeared that defendant employed one T. to make the sale. It was conceded that plaintiff was not retained directly by defendants, but that he was commissioned by their agent, T. T. testified, "We were both brokers in the matter; there was a sort of implied understanding between brokers that I would divide commissions with him." Plaintiff testified that T. "told me he would pay me a commission." Before commencing the action, plaintiff threatened suit for only half the commission. *Held*, that plaintiff's employment was by T. on an agreement to divide his commission; and that so, as subagent, plaintiff sustained no such relation to defendants as made them liable for his compensation.

Also *held*, that assuming that T. employed plaintiff as broker for defendants, it was incumbent on plaintiff to prove that T. had authority so to do.

Plaintiff claimed that defendants empowered T. to substitute another in his stead, which was denied by them. But plaintiff relied on an alleged admission of defendants to the contrary. Before commencing the action, plaintiff's attorney called on defendants to ascertain "whether T. had authority to bind defendants, or to sell and employ a broker." Defendants said "that T. was authorized to take any steps necessary to sell." *Held*, that this did not involve authority on T. to employ another broker.

Also *held*, that the rule "when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of his agent," does not apply so as to validate a delegation of his agency by a broker.

Appeal from judgment of the General Term of the City Court affirming judgment on a verdict.

Action for broker's commission on a sale of realty. The opinion states the case.

John Brooks Leavitt, for defendants (appellants).

Lyman L. Settel, for plaintiff (respondent).

Pryor, J. At the close of plaintiff's case, the defendants moved a dismissal of the complaint, on the grounds that the

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plaintiff had no authority as broker of the defendants, and was not the procuring cause of the sale; and the motion was renewed upon all the evidence.

We are of the opinion that enough was shown to authorize the inference that the sale was effected through the instrumentality of the plaintiff; but whether he acted upon the employment of the defendants is a more difficult question.

It is a conceded fact that the plaintiff was not retained directly by the defendants; but the contention is that he was commissioned by their agent, Thompson. And so he was, without doubt; but whether as subagent of Thompson or as independent broker for the defendants, is a point upon which, in a measure, the appeal depends. Thompson was the broker whom the defendants employed; and if, to promote the sale, he engaged the plaintiff as his auxiliary on an agreement to divide commissions, then, as subagent, plaintiff must look only to Thompson for compensation. Thompson testifies, "We were both brokers in the matter; there was a sort of implied understanding between brokers that I would divide commissions with him." Plaintiff says, Thompson "told me he would pay me a commission" — a commission, not *the* commission, and *he*, not the defendants, would pay it. Obviously, the plaintiff's own version of the transaction is in harmony with Thompson's statement that he was to divide his commission with the plaintiff. But that the plaintiff understood he was only to share Thompson's compensation is cleared of all doubt by the fact that he presented a bill and threatened suit for only half the commission. True, the claim for half commission was asserted against the defendants; but that only shows plaintiff's mistake as to the party legally liable to him. True, also, that the next day plaintiff's attorney made demand of the full commission; but that only shows the attorney's skill in trying to nullify the effect of the client's admission.

Our conclusion is that, upon the uncontradicted evidence, plaintiff was employed by Thompson to assist him in the negotiation on an agreement to divide his commission; and that so, as subagent, plaintiff sustained no such relation to the

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defendants as made them liable for his compensation. 1 Am. & Eng. Ency. of Law, 395.

Assuming, however, that Thompson employed plaintiff as broker for the defendants, it was incumbent upon plaintiff to prove that Thompson had authority so to employ him. Without specific authority from his principal, an agent has no power to delegate his trust. *Lewis* v. *Ingersoll*, 3 Abb. Ct. App. Dec. 55; *Newton* v. *Bronson*, 13 N. Y. 587; *Hicks* v. *Dorn*, 9 Abb. (N. S.) 53; *Merrill* v. *Farmers' Loan, etc., Co.*, 24 Hun, 300; *Lyon* v. *Jerome*, 26 Wend. 485. Indisputably, the office of broker involves personal confidence and discretion. *Bonwell* v. *Howes*, 15 Daly, 43.

Did the defendants empower their broker Thompson to substitute another in his stead? Both Thompson and defendant Arthur C. Tucker, deny the communication of any such power. But plaintiff relies on an alleged admission of Tucker to the contrary. A day or two before commencing this action plaintiff's attorney called on Mr. Tucker, for the purpose of ascertaining "whether Mr. Thompson had authority to bind the Tuckers, or to sell and employ a broker." Mr. Arthur C. Tucker said, "that Mr. Thompson was authorized to take any steps necessary to sell." As broker employed to sell, Thompson, of course, had authority to take the steps necessary to that end. To have denied him such power would have been to render his agency frustrate. But, surely, authority to take the steps necessary to a sale, does not involve authority to employ another broker; for, if one broker, then why not a second and a third, and so on indefinitely, until the principal be crushed under the accumulated weight of countless commissions?

But the person whom the attorney had the precaution to take with him as a corroborative witness, fails to sustain him, saying, that Tucker's words were that Thompson "had full authority to sell." This is no more than a declaration that Thompson was a broker to sell. The learned trial judge in his charge misapprehended the effect of the testimony, when he told the jury that Tucker stated to the attorney "that

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Thompson had full authority to employ brokers for the sale of the property."

On a critical review of the case we see that, at most, the finding that the defendants authorized Thompson to retain the plaintiff, is sustained only by a scintilla of evidence, and this is ineffectual against a motion to nonsuit. *Dwight* v. *Ins. Co.*, 103 N. Y. 341.

The respondent argues, however, that by consummating the sale which he negotiated, the appellents are estopped to question his authority, upon the ground that the enjoyment of the fruits of an agent's act charges the principal with responsibility. The principle upon which the respondent relies is of recognized and salutary operation; but he misapprehends its import and application. The rule as propounded in a leading case of this state is, that "when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of his agent." *Smith* v. *Sweeny*, 35 N. Y. 291; *Mayer* v. *Dean*, 115 id. 556. Here, the act of Thompson in substituting plaintiff as broker, if there were such substitution, was beyond the scope of Thompson's authority; and the transaction, the enjoyment of the fruits of which is supposed to estop the appellants, was not the transaction of their agent but of a stranger. The rule was never applied, and in reason can never be applied, so as to validate a delegation of his agency by a broker; else the principal would be at the mercy of his broker, and might be burdened with liability to as many deputies as the broker should choose to appoint. The law is settled otherwise. "Where the subagent has been appointed without authority, and his acts are afterwards ratified, he can recover no compensation from the principal, but must look to the agent." 1 Am. & Eng. Ency. of Law, 395.

We conclude, therefore, that upon the uncontroverted evidence, the appellants are not responsible for the employment of the plaintiff, and are under no obligation to compensate him.

Our conviction that the respondent's claim is without equity,

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reconciles us the more readily to the defeat of his judgment on legal grounds

Judgment reversed and new trial ordered, costs to abide the event.

Bookstaver and Bischoff, JJ., concur.

Judgment reversed and new trial ordered.

Duffy *v.* Dawson.

Evans *v.* Dawson.

(New York Common Pleas — General Term, February, 1893.)

In this state, choses in action have never been the subject of levy under execution.

The service of an order in supplementary proceedings gives a judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor.

Appeal from an order of the General Term of the City Court reversing an order of the Special Term in supplemental proceedings.

A. Edward Woodruff, for Evans, plaintiffs (appellants).

Edward W. S. Johnston, for Duffy, plaintiff (respondent).

Bookstaver, J. A clear understanding of the facts in this case is necessary in order to the solution of the questions raised on this appeal. From the papers it appears that Duffy was at one time the owner of a liquor store on the southeast corner of One Hundred and Fourth street and Third avenue in this city; that the same was purchased of him by the judgment debtor, Dawson; that in part payment for that purchase he gave the plaintiff Duffy a promissory note for $400; before that note was paid, Dawson sold the store to Thomas Barry; at the time of the last sale, December 16, 1891, this note was unpaid, and was disputed by Dawson, who claimed that it was not given for a valuable consideration; thereupon

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it was arranged between Barry, the purchaser, and Dawson, the seller, and Duffy, the claimant, that the sum of $400, part of the purchase money on the last sale, should be placed in the hands of one C. L. Peetsch, to be paid to Dawson on January 16, 1892, if no liens or claims should be made against the store; at the same time Duffy gave notice to Barry that he had this claim against the $400 for a part of the purchase money of the store; Duffy thereafter, and on the 13th of January, 1892, commenced his action against Dawson to recover the amount of the promissory note before mentioned; in that action Dawson was represented by Mr. Woodruff as his attorney, and such proceedings were had therein that on the 2d of February, 1892, judgment was entered on the verdict of a jury in favor of the plaintiff and against the defendant, for the sum of $540.84; on the 3d of February, 1892, one of the justices of the City Court granted an order directing Peetsch to appear on February 6, 1892, to be examined as a witness in supplemental proceedings, and in that proceeding he was examined; on the 23d of February, 1892, another justice of said court ordered Peetsch, immediately after the personal service upon him of that order, to pay the $400 in question to the sheriff of the city and county of New York, to be applied upon Duffy's execution, which order Peetsch obeyed, and paid the money to the sheriff. Meanwhile, and on or about the 22d day of December, 1891, C. H. Evans & Sons, by Mr. Woodruff, commenced an action against Dawson to recover an indebtedness of $183 for goods sold and delivered; Dawson did not appear in that action, and judgment was entered by default on January 29, 1892, for the sum of $177.62, and execution was issued thereon to the sheriff on the same day, with directions to levy upon the $400 in the hands of Peetsch. During the pendency of the latter action, and on the 31st of December, 1891, Evans received from Dawson an order upon Peetsch for him to pay Evans out of the $400 held by him the sum of $125, which was duly served on Peetsch on or about the same day. These facts having come to the knowledge of the sheriff, he refused to

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apply the money received by him under the order of February 23, 1892, upon the Duffy execution. Duffy then moved the court upon notice to Evans and the sheriff for an order requiring the latter to pay the $400 in question upon his execution, pursuant to the requirements of the order of the twenty-third of February. Upon the hearing of that motion the justice sitting at Special Term refused to grant it, on the ground as stated in the order, that the court was of the opinion it had no power to grant the same, which we think was not an exact statement of the reason for his refusal, which was rather, as appears from the case, that he thought in a case where there was a dispute as to the title of the property he ought not to grant the order. From this part of the order Duffy appealed to the General Term of the City Court, where the order was reversed, and the sheriff was again directed to pay the $400 to Duffy, and it is from this order that the appeal to this court is taken.

It is undoubtedly true that where there is a controversy as to the title to property in the hands of a third person, he will not be ordered to deliver it over to the judgment creditor. *In re Western National Bank*, Law Journal, April 9, 1892; *Frost* v. *Craig*, 16 Daly, 107; *Barnard* v. *Kobbe*, 3 id. 373; *Rodman* v. *Henry*, 17 N. Y. 482; *Schrauth* v. *Dry Dock Savings Bank*, 86 id. 390; *West Side Bank* v. *Pugsley*, 47 id. 368; *Teller* v. *Randall*, 26 How. 155; *Roy* v. *Baucus*, 43 Barb. 310. And the first question in this case is whether there is such a controversy in relation to the title to the money in question.

All the facts in the case are before us, and on these facts we think questions of law only arise which may properly be determined on a motion where all the parties interested are in court. There is no dispute of the fact that the money was deposited with Peetsch by consent of Duffy, Barry and Dawson, to meet any claim or lien that might be made against the store before the 16th of January, 1892. Duffy, immediately on the deposit of the money, made a claim for the whole amount, and it was principally on account of this claim that the money was

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deposited. There is no doubt but that the order given by Dawson on Peetsch to pay Evans $125 was sufficient to convey a title to the same to Evans, and operated as an equitable assignment of the same, provided Dawson at the time had the right to give such order and Peetsch was under obligation to accept it. *Lauer* v. *Dunn*, 115 N. Y. 405; *Brill* v. *Tuttle*, 81 id. 454; *Throop Cleaner Co.* v. *Smith*, 110 id. 83; *Fairbanks* v. *Sargent*, 104 id. 108; *Holmes* v. *Evans*, 129 id. 140; *Gunther* v. *Darmstadt*, 14 Daly, 368; *People* v. *Comptroller*, 77 N. Y. 45; *Schmittler* v. *Simon*, 101 id. 554. And it has been held that a formal acceptance of such an order was not necessary in order to make it binding, but that notice of the same was sufficient. *Williams* v. *Edison Electric Illuminating Co.*, 16 N. Y. Supp. 857; *People* v. *Comptroller*, 77 N. Y. 45. But in this case the money was deposited with Peetsch upon a special understanding between Duffy, Barry and Dawson that it should be held until the sixteenth of January for a special purpose; and Dawson, without the consent of the parties interested in the fund, could not divert it from that purpose by any order which he might give for the payment of a part of it to a third party, and Duffy had before that time made a claim for the whole of it. The order, we think, cannot avail Evans in this controversy.

But it is claimed that Evans & Sons had a first lien on the money by reason of their prior execution. This would undoubtedly be true if the specific money consisted of bills or coin deposited by Barry with Peetsch and was kept intact and thus capable of actual manual seizure. In *N. Y. Life Ins. Co.* v. *Mayer*, 14 Daly, 318, referring to execution liens, we held, "as between creditors this charge or lien attaches to personal property at the time an execution on the judgment is issued to the sheriff for service, so that if the junior creditor issues the first execution he takes priority as to personal property over all senior creditors, and when the sheriff makes an actual levy on the debtor's goods and chattels, the lien becomes complete against all the world, including a subsequent purchaser in good faith. See also *Lambert* v. *Paulding*, 18

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Johns. 311; *Roth* v. *Wells*, 29 N. Y. 471; *William* v. *Shelly*, 37 id. 375; *In re Dawson*, 110 id. 114. But in this case there is nothing to show that the $400 deposited with Peetsch was in bills, coin, check or otherwise; nor is there anything to show that the specific money or coin, if it were paid in money or coin, was kept apart from other money so that it could be levied upon by the sheriff; and it does not appear that any levy was ever made upon it. The court below, and we think properly, has regarded it all the way through as a chose in action. Choses in action in this state have never been the subject of levy under execution. *Ransom* v. *Miner*, 3 Sandf. 692; *Ingalls* v. *Lord*, 1 Cow. 240; *Denton* v. *Livingston*, 9 Johns. 96; *Carroll* v. *Cone*, 40 Barb. 220; *Baker* v. *Kenworthy*, 41 N. Y. 216. *Sickles* v. *Sullivan*, 19 N. Y. Supp. 749, is not in conflict with these authorities, for that case decided that under section 1405 of the Code the execution bound property from the time of its delivery to the sheriff to be executed, and if the goods were sold subsequently by a person authorized to do so, it followed the equity of the judgment debtor in the pledged chattels, and attached to the surplus arising from the sale and remaining in the hands of the pledgee. That was because the lien attached to the pledged goods at the time of the delivery and hence followed the proceeds of them, which is entirely different from holding that an execution may be levied upon a chose in action.

On the other hand, supplemental proceedings are in lieu of the old creditor's bill, and in *Lynch* v. *Johnson*, 48 N. Y. 33, it was held that "proceedings under sections 292 and 294 of the old Code, which were similar in all respects with sections 2441, 2446 and 2447 of the present Code, were parts of the same scheme for the collection of debts inaugurated by the Code, and that these sections furnished a simple substitute for the creditor's bill as formerly used in chancery, and that the commencement of the creditor's suit in chancery gave the creditor at once a lien upon the equitable assets of the judgment debtor. He was rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy

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upon the equitable assets of the debtor. Under sections 292 and 294, the service of the order takes the place of the commencement of the suit under the old system, and should give the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor." Citing *Storm* v. *Waddell*, 2 Sandf. 494; *Brown* v. *Nichols*, 42 N. Y. 26. See, also, *McCorkle* v. *Herrman*, 117 id. 297; *Barnes* v. *Morgan*, 3 Hun, 705; *Bevans* v. *Pierce*, 1 City Court Rep. 259; the latter of which was in the City Court and is almost upon all fours with this case.

We, therefore, think the order appealed from should be affirmed, with ten dollars costs and disbursements.

Bischoff and Pryor, JJ., concur.

Order affirmed.

Fortunato *v.* Mayor, etc., of the City of New York and the Twelfth Ward Bank of the City of New York et al., Impleaded.

(New York Common Pleas—General Term, February, 1893.)

In an action to foreclose a municipal mechanics' lien and to determine the amount and precedence of several claims against the city of New York, under a contract with one D., the only question in litigation was to whom, in what order and amounts the money due D. from the city should be paid. On the trial, the referee allowed an amendment to D.'s answer which authorized a recovery by him against the city for extra work. This was at a hearing which the legal representative of the city did not attend, it being, as he and others supposed, though erroneously, for the purpose of summing up a matter which, on the then state of the pleadings, was of no concern to his client. From the judgment entered thereon by D. against the city the latter appealed, and on its motion an order was entered opening the judgment, permitting the city to oppose the motion to annul and, if need be, to resist D.'s claim for extra work. *Held*, that the order was a discretionary one and properly granted.

Appeal from order at Special Term, opening judgment on referee's report. The opinion states the case.

Charles W. Dayton, for Twelfth Ward Bank, defendant (appellant).

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C. J. Hall, for John F. Dawson, defendant (appellant).

William H. Clark (*Theodore Connelly* and *John L. O'Brien*, of counsel), for the mayor, etc., defendants (respondents).

PRYOR, J. The action is to foreclose a municipal mechanics' lien, and to determine the amount and precedence of several claims against the city under a contract with one Dawson. As the case stood upon the pleadings before the amendment complained of, the city was a mere stakeholder; and the only question in litigation was, to whom, in what order and in what amounts the money due to Dawson from the city was to be paid. No claim whatever was made against the city for extra work. So the case was tried; but on its conclusion, the referee allowed an amendment of Dawson's answer which authorized a recovery by him against the city for extra work in the sum of $5,840. The evidence touching the extra work was not irrelevant to the issues as they then stood; and its admission did not necessarily admonish counsel for the city that a recovery for it was contemplated in the action. Indeed, it appears that the claim for the extra work did not accrue till after the commencement of the action. The amendment of Dawson's answer authorizing the recovery of the $5,840, was made at a meeting which the legal representative of the city did not attend, and which he and others supposed, though erroneously, to be held only for the purpose of summing up, a matter which, on the then state of the pleadings, was of no concern to his client. On June 9, 1892, judgment in favor of Dawson against the city, on account of the extra work, was entered for the above-stated amount. From the judgment the city appealed, 16th of September, 1892, and on October 1, 1892, made a motion for the order under review. The order, in effect, opens the judgment, permits the city to oppose the motion to amend, and, if need be, to resist Dawson's claim for the extra work.

The order is not for a retrial of the case or review by the referee of his own determination; but only opens a default for the litigation of an issue that had gone without contesta-

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tion. Neither was the effect of the order merely to allow an exception to the ruling permitting the amendment. Nor yet was the referee *functus officio* in the sense that the case might not be sent back to him for the purpose of opposing a motion that had prevailed by default, and, if necessary, to defend a claim not within the issues upon which the trial proceeded. Had the referee held this claim to be in issue on the original pleadings and so have determined it, then, indeed, would he have been *functus officio*, and the order a direction to revise his decision and retry the case.

Such being the nature of the order under review, the authorities so industriously collected by the learned counsel for the appellants are inapplicable to the point in judgment. The order being, in effect, the vacatur of a default, taken against the respondent through its "mistake, inadvertance, surprise or excusable neglect," was, by the express terms of the Code, within the competence of the court and dependent on its discretion. § 724. Nay, for that matter, independently of the statute and irrespective of its restrictions, the court had inherent power to grant the relief afforded by the order. *Vanderbilt* v. *Schreyer*, 81 N. Y. 646; *Dinsmore* v. *Adams*, 48 How. 274; 66 N. Y. 618; *Ladd* v. *Stevenson*, 112 id. 332; *Hatch* v. *Central Nat. Bank*, 78 id. 487; *Matter of Buffalo*, Id. 362; *Trustees, etc.*, v. *Merriam*, 59 How. 226.

The order, then, being within the jurisdiction of the court, was discretionary, and we are to say whether the discretion of the court in passing the order was abused or improvidently exercised. We think not.

It is extremely doubtful whether in any aspect, the claim for extra work can be made a ground of recovery against the city. Consolidation Act, § 1824 *et seq.*

The order of the referee allowed an amendment to conform the pleading to the proof; but this can never be done on the trial when, as here, the amendment changes substantially the claim or defense. Code, § 723; *Dougherty* v. *Vallonton*, 6 J. &. S. 455, 457; *Quimby* v. *Claflin*, 13 Wkly. Dig. 203; *Trustees* v. *Merriam*, 59 How. 226; *Woolsey* v. *Trustees*, 2

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Keyes, 605; *Price* v. *Brown*, 98 N. Y. 388; *Bockes* v. *Lansing*, 74 id. 437.

Since it appears that all the money, except the $5,840, has been distributed among the several claimants and the only question to be litigated under the order on appeal is the validity of this claim for extra work, which concerns only Dawson and his assignees, we do not preceive any embarrassment or prejudice to other parties which should have prevented an exercise of judicial discretion in favor of the respondent.

For, certainly a municipal corporation is no less entitled than a natural person to relief from the consequences of the improvidence of its counsel, if, indeed, regard for the public interests do not give it a claim to even greater indulgence. *Greer* v. *Mayor, etc.*, 1 Abb. (N. S.) 210, 211; *Seaver* v. *Mayor, etc.*, 7 Hun, 331; *Brooks* v. *Mayor, etc.*, 12 Abb. N. C. 350; *Lunney* v. *Mayor, etc.*, 14 Wkly. Dig. 140.

Observing, therefore, no abuse of discretion in the allowance of the order by the learned judge at Special Term we decline to reverse it. *Vanderbilt* v. *Schreyer*, 81 N. Y. 646; *Bryon* v. *Durrie*, 6 Abb. N. C. 139; *Jones* v. *Hoyt*, 10 id. 324; *Morss* v. *Husbrouck*, 13 Wkly. Dig. 393; *Morrison* v. *Agate*, 20 Hun, 23; *Barton* v. *Barton*, 24 Wkly. Dig. 219; *Avery* v. *New York Central, etc., R. Co.*, 9 N. Y. Supp. 404.

Order affirmed with costs.

Bookstaver and Bischoff, JJ., concur.

Order affirmed.

Lugar *v.* Swayze.

(New York Common Pleas — General Term, February, 1893.)

In an action brought by plaintiff against defendant, a married woman, for work done in a flat in which she resided with her husband, it appeared that a written estimate for the work was made out in defendant's name and sent to her by mail. Plaintiff knew that defendant was a married woman, and in one of the interviews with her had been told that she had submitted the estimate to her husband, who thought it was too high. There was other testimony showing that plaintiff knew defendant's husband was living. After the work had been finished and payment

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therefor demanded on several occasions of defendant, plaintiff accepted a promissory note made by defendant's husband for the full amount of the bill, which was thereafter sued upon and put in judgment. On the trial hereof plaintiff was nonsuited. *Held*, proper; that plaintiff's judgment against defendant's husband was conclusive evidence that he looked to him as the principal debtor.

Also *held*, that plaintiff's contention that they ought not to be concluded by that judgment, as the action was based upon the promissory note and not upon the original claim, is not tenable, for the reason that the original claim was the only consideration for the giving of the note, and without such consideration the note would have been void as between the parties.

Also *held*, that under the plea of *nil debet*, any fact tending to show there was no indebtedness on the part of defendants, was admissible.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment entered on a nonsuit, and affirming an order denying a motion for a new trial.

William Douglas Moore, for plaintiff (appellant).

Palmer, Boothby & Warren, for defendant (respondent).

BOOKSTAVER, J. This action was brought by the plaintiff, a decorator, against the defendant, a married woman, for work done in papering and decorating the flat No. 226 West Fifty-ninth street, New York, and for certain work done in cleaning carpets and in removing and packing furniture, etc. A written estimate was made out in her name by the plaintiff and sent to her by mail. Plaintiff himself testified that he knew defendant was a married woman, and in one of the interviews with him had told him she had submitted it to her husband, who thought it too high, and there was other testimony given by plaintiff strongly tending to show that he knew that defendant had a husband living. Under such circumstances we think it was his duty to have informed himself as to whom the flat belonged. After the work was finished plaintiff demanded payment from the defendant by mail several times, and in response to his last request he received a promissory note, made by defendant's husband, for the full amount of the bill, which he accepted. When it became due

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and was unpaid, plaintiff wrote Mr. Swayze asking for its payment, and offered to renew it for a portion of the amount, if necessary. Thereafter, the plaintiff sued on this note and obtained judgment thereon in the state of New Jersey. In an action against a married woman for repairs on her house, proof that the plaintiff obtained judgment against her husband is conclusive evidence that the plaintiff looked to him as the debtor. *McCausland* v. *King*, 26 N. W. Rep. 836. Appellant contends, however, that they ought not to be concluded thereby, as the action in New Jersey was based upon the promissory note and not upon the original claim. But the original claim was the only consideration for that note, and without such consideration the note would have been void as between the parties.

As far as we are able to see from the return, there is nothing to distinguish this case from any other where the wife, as part of her family duties, superintends and looks after the family home, seeing that it is kept in order and suitable for a family residence. If the defendant could be held personally liable in this action, there is nothing to hinder any tradesman from holding the wife liable for everything pertaining to the household which she directs to be done, and she would be liable for the hire of the household servants, who are always under her direction and selection.

The cases cited by the appellant as to the effect of judgments, refer to instances where two people are severally liable for the same debt. In such case, it is true, judgment against one is no defense to an action against the other.

Appellant also contends that it was error to admit in evidence the note given by Mr. Swayze, claiming that its introduction tended to prove payment, which was not pleaded, and which should have been if he had desired to avail himself of that plea. But under the plea of *nil debet*, any fact tending to show there was no indebtedness on the part of the defendant, was admissible. *Lent* v. *New York, etc., Co.*, 130 N. Y. 511. He also contends that the defendant's motion to dismiss was not broad enough to cover the questions raised; yet it was

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plainly made upon the theory and contention that no claim against defendant had been proven, but on the other hand, the proof showed that the defendant's husband was the debtor, and had been made so by the highest authority known to the law.

The judgment should, therefore, be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concur.

Judgment affirmed.

KLEE *v.* GRANT.

(New York Common Pleas — General Term, February, 1898.)

Plaintiffs replevined from the defendant, a sheriff, goods which the latter attached, under process, against R. and others. Plaintiffs claimed that the goods were attached in R.'s store, whither they had been sent by plaintiffs, "on memorandum," and at the time of the seizure by the sheriff, plaintiffs had the right to the immediate possession thereof. On the trial, it appeared that a clerk of R. came to the plaintiffs to select goods to be sent to R.'s store to compare with other goods, and if found of use, they would buy them; plaintiff testified that R. was absolutely entitled to their possession and control until they were demanded. The goods were never demanded except from the sheriff, after he had attached them. Plaintiff was nonsuited. *Held*, proper; that at the time the property was attached, the right of possession was vested in R. and not in plaintiffs.

Also *held*, that if R. was to be considered as bailee of the plaintiffs, his possession was not the possession of the latter, but was under a contract by which he had the right to retain the goods, upon paying the price, and his right to possession continued until he had refused to pay therefor, or to return the goods upon demand.

APPEAL by the plaintiffs from a judgment of the General Term of the City Court, entered upon the dismissal of the complaint. The opinion states the case.

Abraham Gruber, for defendant (respondent).

Samuel Fleischman, for plaintiffs (appellants).

DALY, Ch. J. The plaintiffs seek by this action of replevin to take from the sheriff goods which the latter attached under

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process against Rothschild and others. The goods were attached in the Rothschild store, whither they had been sent by plaintiffs, "on memorandum;" and the question in this case is whether plaintiffs had the right to the immediate possession of the goods at the time of the seizure by the sheriff, for the Code prescribes that replevin may not be maintained for a chattel seized by virtue of a warrant of attachment against the property of a person other than the plaintiff, if, at the time of the seizure, the plaintiff had not the right to reduce it into his possession. Code Civ. Proc. § 1690, subd. 3.

Taking the testimony on the part of the plaintiffs in the aspect most favorable to them, it appears that a clerk or buyer of the Rothchilds came to the plaintiffs to select goods to be sent to his store to compare with other goods, and if he found he could use them he would buy them; and that as plaintiff Bernard Klee swears, Rothschild was absolutely entitled to their possession and control until they were demanded. The goods were never demanded except from the sheriff after he had attached them. It, therefore, appears from the plaintiff's own testimony that the transactions between them and the Rothschilds gave the latter the right to possession at the time of the sheriff's seizure, for the plaintiffs could not retake the goods until they had made a demand of them, or their price, of the Rothschilds, and, therefore, under the Code they cannot have replevin.

The legal results of the plaintiffs' own statement make it unnecessary to discuss the question whether there was not an actual sale by them to the Rothschilds of the property in question. Had the case turned upon the answer to that question, the evidence should have been submitted to the jury; but it matters not what was the real transaction, for that which the plaintiff proved vested the right of possession in the Rothschilds and not in the plaintiffs when the property was attached.

None of the authorities cited by the plaintiffs as to the possession by bailees, trustees, agents, factors and mortgagees, sustain their contention that a demand was unnecessary before

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they could repossess themselves of the goods they had delivered to the Rothschilds with the right, as their evidence shows, to absolute possession and control. If the Rothschilds were to be considered as bailees of the plaintiffs, their possession was not the possession of the latter, but was under a contract by which they had the right to retain the goods upon paying the price; and their right to possession continued until they had refused to pay the price or to return the goods upon demand.

The judgment should be affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Judgment affirmed.

Sperry v. Hellman.

(New York Common Pleas — General Term, February, 1893.)

In an action for an alleged conversion of personal property an order for the arrest of the defendants was issued and executed. Thereafter judgment was recovered in that action, by default, for dismissal of the complaint with costs. In an action on the undertaking given on arrest, *held*, that the judgment of dismissal in the action of conversion was a final decision that the plaintiff was not entitled to the order of arrest.

Appeal from a judgment of the General Term of the City Court of New York, affirming a judgment for defendants for the excess of their counterclaims over and above the sum to which plaintiff was adjudged entitled, which was entered upon a verdict directed by the trial court; and affirming also an order denying plaintiff's motion for a new trial made upon a case and exceptions.

Action to recover upon an undertaking given to secure an order of arrest pursuant to the provisions of section 559 of the Code of Civil Procedure.

Howard A. Sperry, plaintiff (appellant), in person.

Seligman & Seligman, for defendants (respondents).

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BISCHOFF, J. Howard A. Sperry and Robert W. Reid were jointly sued in the Supreme Court by the Metropolitan Concert Company (Limited) for the alleged conversion of personal property; an order for the arrest of both defendants was issued and executed as to defendant Sperry only; and judgment was on April 15, 1885, recovered in that action, by default, against the Metropolitan Concert Company (Limited) for dismissal of the complaint with costs. Asserting this judgment to be a final decision that the Metropolitan Concert Company (Limited) was not entitled to the order of arrest, Sperry brought the present action to recover upon the undertaking given to obtain it pursuant to the provisions of section 559 of the Code of Civil Procedure. Thereafter the sureties on that undertaking were permitted by the Supreme Court to try the issues in the action brought by the Metropolitan Concert Company (Limited), and this trial resulted in a judgment in its favor. On appeal to the General Term this last-mentioned judgment was reversed and the reversal sustained by the Court of Appeals, which tribunal also directed judgment for the defendants for dismissal of the complaint, with costs. This action, which had been in abeyance, then proceeded, and upon trial plaintiff recovered a judgment which, on appeal to us, was reversed because the trial court erroneously included in the recovery the expense which plaintiff had incurred for counsel fees in the Supreme Court action subsequent to the judgment therein of April 15, 1885, and the general costs thereby awarded to both defendants. Our decision is reported in *Sperry* v. *Hellman*, 13 N. Y. Supp. 899; 37 N. Y. St. Repr. 258, and on motion for reargument of the appeal we reaffirmed it (16 N. Y. Supp. 954; 40 N. Y. St. Repr. 991), and granted appellant leave to present the points involved to the Court of Appeals, of which, however, he has not availed himself.

On retrial of this action the court eliminated from plaintiff's recovery the items held by us to be objectionable, and this constitutes the burden of the present appeal. We are, therefore, in effect asked to review our former decision, but on grounds

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which counsel admits were not then presented. These are, that the judgment of April 15, 1885, in the action of the Metropolitan Concert Company (Limited) against Sperry and Reid, was not a final decision that the plaintiff was not entitled therein to the order of arrest, and that because the cause for arrest and the cause of action were identical, the counsel fees incurred on the subsequent trial of the issues and the appeals to the General Term of the Supreme Court and the Court of Appeals, were necessarily incurred by Sperry to extricate himself from the arrest; and that the failure of the defendants in this action to object to the recovery of the costs awarded to Sperry and Reid jointly in the Supreme Court action, by answer or demurrer, precluded them from such an objection under the provisions of section 499 of the Code of Civil Procedure; that all objections, which could have been raised by answer or demurrer, except those to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, are waived if the objection is not so taken.

The bare statement of them sufficiently refutes the tenability of the grounds now urged for reversal. If the judgment of April 15, 1885, against the Metropolitan Concert Company (Limited) was not a final decision that the plaintiff in that action was not entitled to the order of arrest, then obviously this action was prematurely brought and the complaint should have been dismissed, for the condition of the undertaking sued upon is that the plaintiff therein named will pay costs and damages "if it is finally decided that he was not entitled to the order of arrest." To maintain his right to any recovery whatever in this action plaintiff had, therefore, necessarily to maintain the finality of the judgment of April 15, 1885, on the trial, and having done so he will not, on appeal, be permitted to avail himself of a contrary contention. *Fulton* v. *Metropolitan L. Ins. Co.*, 47 N. Y. St. Repr. 111; 1 Misc. Rep. 478; *Fay* v. *Muhlker*, 48 N. Y. St. Repr. 699, 701; 1 Misc. Rep. 321. Defendants do not appeal, but, clearly, if appellant's present contention were held to be correct and

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we should reverse the judgment, respondents, on a new trial, would be entitled to a dismissal of the complaint.

This action is not brought upon the judgment of April 15, 1885, jointly recovered by Sperry and Reid against the Metropolitan Concert Company (Limited) for the costs of that action, but upon the undertaking therein given to obtain the order of arrest. Reid was not arrested and is not a necessary or a proper party to an action by Sperry to recover the costs and damages which accrued to the latter by reason of his arrest. The provisions of section 499 of the Code of Civil Procedure have, therefore, no application, and defendants were not precluded on the trial from objecting to the allowance as an item of plaintiff's alleged damages of a joint demand in favor of Sperry and Reid, because they had not raised the objection that there was a defect of parties plaintiff by answer or demurrer.

The judgment and order appealed from must be affirmed, with costs.

Daly, Ch. J., and Pryor, J., concur.
Judgment and order affirmed.

Flagler v. Lipman.

(New York Common Pleas—General Term, February, 1893.)

The test to determine whether an agreement to pay the debt of another is within the Statute of Frauds, is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of default of a third party.

Appeal from a judgment of the General Term of the City Court, affirming a judgment for plaintiff in the court below, and an order denying a motion for a new trial. The opinion states the case.

E. A. Jacobs, for defendant (appellant).

Menken Bros., for plaintiff (respondent).

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Bookstaver, J. This action was brought by the plaintiff upon a verbal promise made by the defendant, to be answerable to the former for the payment of $873, the balance due him from one William C. Schmidt, on account of labor and material furnished the latter on certain premises belonging to him, the consideration for such promise being a release, under seal of Schmidt, from all indebtedness for said work. On the faith of this agreement plaintiff executed to Schmidt the release bargained for, and at the same time received from the defendant $223, and afterwards the further sum of $200, leaving a balance of $450, for which recovery is sought in this action. The answer denies every allegation of the complaint, except that plaintiff received the two sums of money from defendant, and in respect to them alleges that they were paid by him at the request, with the consent and for the account of one William Bell (the former owner of the property in question and the person from whom Schmidt derived title thereto), who was indebted to plaintiff.

On the trial it appeared that Lipman, the defendant herein, together with another, held matured second mortgage on the property to the amount of $13,000, subject to a purchase-money mortgage of $118,500.

The jury found a verdict in favor of the plaintiff, and thus decided that Schmidt, not Bell, owed the plaintiff the money in suit, and it appears from the case that the plaintiff was in a position to file a mechanics' lien upon the premises, which would have been to the injury of the defendant, the mortgagee, hence his interest in preserving the premises from such an incumbrance.

Notwithstanding this, and notwithstanding the fact that the defendant, a lawyer, presumed to know the law, by means of this agreement obtained from the plaintiff, a man not skilled in the law, a release of his claim, he, in the court below, sought and now seeks to avoid the verbal agreement, on the ground that it has no validity under the Statute of Frauds.

It is quite true that that statute requires an agreement to pay the debt of another to be in writing, and signed by the

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person sought to be charged therewith, but the test to be applied in such a case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person. In other words, whether he is the debtor or whether his relation to the creditor is that of a surety for the performance by some other person of the obligation of the latter to the creditor. *Brown* v. *Weber*, 38 N. Y. 187. A verbal undertaking is within the statute, unless the defendant, before making the promise, had so dealt as to make the debt his own, or had incurred a duty to pay the amount due the plaintiff. *Ackley* v. *Parmenter*, 98 N. Y. 425.

In this case the defendant had promised to pay Schmidt's debt if plaintiff would release Schmidt and rely solely and only upon him for payment; under such a promise he became the original obligor and, therefore, is not within the statute, and his promise need not be in writing.

The consideration for such a promise was quite sufficient. The release relieved the property in which the defendant was interested from a possible mechanics' lien, and forever prevented the plaintiff from asserting his claim against Schmidt. There was, therefore, not only a valuable consideration for the agreement on defendant's part, but a detriment to the plaintiff.

There is no proof to sustain appellant's contention that plaintiff had not performed his contract with Schmidt at the time the agreement was made, nor is any such nonperformance pleaded.

As appears from the case, the work done by plaintiff was done under Schmidt's direction and, as before shown, he was liable to the plaintiff for its payment. It was not necessary to show, therefore, that the work was done to Bell's satisfaction.

Upon the appeal to this court our attention was not called to any other exceptions than those noticed.

The judgment should, therefore, be affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Judgment affirmed.

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The Eaves Costume Company v. Pratt.

(New York Common Pleas — General Term, February, 1893.)

A person may be domiciled in one state and resident of another. His domicile is the place to which he intends eventually to return and there to remain; while his residence is no more than a fixed abode for the time being, as contradistinguished from a place of temporary sojourn.

In an application by defendant to vacate an attachment against his property issued on the ground of nonresidence, it appeared that his domicile of origin was in Missouri. That while an infant his mother removed her family to Connecticut, for the purpose of completing their education. In 1890, defendant, still an infant, went to New York, established a business office, living at intervals at boarding houses and hotels until 1892, when he rented apartments which he thereafter shortly abandoned, stored his furniture and went to Maine on his summer vacation. While without the state the attachment was issued. *Held*, that under the circumstances defendant was not a resident of New York. That his residence must be presumed to be at the place of his domicile of origin until he had acquired a domicile of choice.

Appeal from an order at Special Term denying defendant's motion to vacate an attachment against his property, which was issued on the ground of his nonresidence, pursuant to the provisions of subdivision 2, section 636, Code of Civil Procedure.

Charles H. Lellman, Jr., for plaintiff (respondent).

Geo. Carlton Comstock, for defendant (appellant).

Bischoff, J. A person may be *domiciled* in one state and *resident* of another. *Frost et al.* v. *Brisbin*, 19 Wend. 11. His *domicile* is the place to which he intends eventually to return and there to remain (*Matter of Thompson*, 1 Wend. 43), while his *residence* comprehends no more than a fixed abode for the time being, as contradistinguished from a place of temporary sojourn. *Matter of Wrigley*, 8 Wend. 134.

On the hearing of the motion to vacate the attachment it appeared from the affidavit of Elizabeth H. Pratt, which was submitted for the purposes of the motion on defendant's

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behalf, that at all times prior to the removal of her family, which consisted of herself and two sons, one of them, the defendant, to New Haven, Conn., their *domicile* was in St. Louis, Mo., and that about the year 1887 the removal to New Haven was effected for no other purpose than to complete the sons' education. The St. Louis *domicile* was, therefore, not abandoned, and as at the time of the removal to New Haven defendant was an infant his domicile was that of his mother. *Lamar* v. *Micou*, 112 U. S. 452.

St. Louis, having been shown to be defendant's *domicile* of origin, its continuance, both during his minority, and thereafter, must be presumed until it satisfactorily appears that he has established a *domicile* of choice. 7 Lawson's Rights, Remedies & Practice, 6067, § 3848. No attempt was made by defendant to prove a *domicile* of choice, but instead he endeavored to show that when the attachment was issued he was not a *resident* of New Haven, but of New York. Plaintiff's right to the attachment, however, was not dependent upon the fact of defendant's *residence* in New Haven, but upon the fact of his *nonresidence* within the state of New York.

In June 1890, when defendant was but twenty years of age, he came to the city of New York to venture in the business of a theatrical manager. For this purpose he established an office, and after having at intervals lived at boarding houses and hotels, about February, 1892, rented apartments at 250 West Thirty-ninth street, in said city, which he in turn abandoned shortly before July fifteenth of the same year, when, as he says himself, he stored his furniture and went to Old Orchard, Maine, there to spend his summer vacation. On July twenty-eighth, concededly while defendant was without the state, the attachment was issued.

The facts narrated show that at the time of issuing the attachment defendant had no fixed abode within, and that he was, therefore, at the time not a *resident* of the state of New York. Assuming that he had a general intention of future return, that fact alone did not constitute a continuance of his

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abode (*Wood* v. *Hamilton*, 14 Daly, 41; *Weitkamp* v. *Loehr*, 53 N. Y. Super. Ct. 83); nor was defendant's own declaration of his intention to renew his abode at a stated time conclusive. *Dietlin* v. *Egan*, 46 N. Y. St. Repr. 762. His *domicile* of origin was in St. Louis. He had not acquired a *domicile* of choice. Actual abode, for business accommodation only, did not effect a change of *domicile*. *Matter of Wrigley*, 8 Wend. 134, 139. It could only be acquired by concurrence of actual *residence* and intention permanently to remain (5 Am. & Eng. Ency. of Law, 862); and without satisfactory evidence that defendant, at the time when the attachment was issued, had a fixed place of abode within the state, his *residence* must be presumed to be at the place of his *domicile*.

The order appealed from should be affirmed, with costs.

Bookstaver and Pryor, JJ., concur.

Order affirmed.

Squire *v.* McDonald.

(New York Common Pleas—General Term, February, 1898.)

In an action upon an undertaking given upon obtaining an order of arrest, it appeared that the order of arrest had been set aside on the merits. *Held*, that the action was not premature though the result of the action might determine that plaintiff was entitled to an order of arrest.

Appeal from a judgment for plaintiff, entered upon a verdict directed by the court.

Action to recover upon an undertaking given to obtain an order of arrest pursuant to the provisions of section 559 of the Code of Civil Procedure.

William R. Wilder, for plaintiff (respondent).

T. D. Kenneson, for defendants (appellants).

Bischoff, J. Plaintiff sued upon an undertaking given to obtain an order for his arrest in an action by one Homer Lee,

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pending in the Supreme Court, to recover damages for the alleged conversion of personal property, which was to the effect required by section 559 of the Code of Civil Procedure that "the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest," not exceeding the amount specified, "if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest." At the time of the commencement of this action the Supreme Court action remained undetermined, but the order of arrest therein had on motion been duly vacated and set aside on the merits, and an order to that effect entered, which by expiration of the time limited for appeal therefrom had become final. Appellants' only contention against the validity of the judgment appealed from, is that the action on the undertaking was prematurely brought because no final decision had been had, that plaintiff in the Supreme Court action was not entitled to the order of arrest therein invoked, and that his right to the order of arrest may yet be determined if the last-mentioned action should eventuate in a judgment in plaintiff's favor, since the cause of arrest arises under section 550 of the Code of Civil Procedure and is identical with the cause of action.

This contention, however, disregards the clear import of the language of the undertaking. It is not that the plaintiff therein named will pay if it is finally decided that he was not entitled to *an* order of arrest, but that he will pay if it is finally decided that he was not entitled to *the* order of arrest. Which order of arrest? Plainly, the one invoked and with immediate reference to which the undertaking was given. This was vacated on the merits and cannot be reinstated by an eventual judgment for plaintiff in the same action though such a result would determine that plaintiff was entitled to *an* order of arrest. There can of necessity, therefore, be no distinction concerning the finality of the decisions that plaintiff was not entitled to *the* order of arrest, between orders vacating an order of arrest on the merits, the time to appeal from which has lapsed, because in the one instance the cause for

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arrest was collateral to the cause of action and in the other it was identical therewith. Code Civ. Proc. §§ 549, 550.

Nor has the question under discussion been determined at variance with the views above expressed in the cases cited on appellants' behalf. *Schuyler* v. *Englert*, 10 Daly, 463, and *Rothwell* v. *Paine*, 9 Civ. Proc. Rep. 128. In neither was the question before the court for review. Both were apparently cases wherein the cause for arrest was collateral to the cause of action, the former actually and the latter constructively so; and whatever the court may have said in its opinions concerning cases wherein the cause for arrest and the cause of action were identical, was *dicta* merely, and without the force of decision.

The judgment appealed from should be affirmed, with costs.

Daly, Ch. J., and Pryor, J., concur.

Judgment affirmed.

Pharo *v.* Beadleston.

(New York Common Pleas — General Term, February, 1893.)

In an action to recover for breach of contract to accept and pay for a quantity of thermometers manufactured by plaintiffs at defendant's instance, the testimony of defendant's agent tended to establish that at the time of entering into the contract, defendant's agent stated to plaintiffs' agent that defendant desired an advertising medium for the brewing business of novel and original design in that line of business; that plaintiffs' agent represented that plaintiffs had not supplied any brewer with the thermometers; that relying upon the truth of this representation defendant's agent was induced to make the contract on defendant's behalf, and that such representation was false and untrue. Plaintiffs were permitted to introduce evidence from which it appeared that thermometers had for a considerable time before the making of the contract been extensively and notoriously used as an advertising medium in a variety of businesses other than that of a brewer. *Held*, that the evidence was admissible as affecting the credibility of defendant's agent.

Appeal from a judgment of the General Term of the City Court of New York which affirmed a judgment for plaintiffs

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entered upon a verdict in their favor, and which also affirmed an order denying defendant's motion for a new trial upon the minutes.

Edward S. Clinch, for plaintiffs (respondents).

Moses Weiman, for defendant (appellant).

BISCHOFF, J. No appeal lies to this court from an order of the City Court of New York which refuses a new trial (Code Civ. Proc. § 3191; *Wilmore* v. *Flack*, 96 N. Y. 512; *Smith* v. *Pryor*, 16 Daly, 169); and without proper exception, founded upon a motion for dismissal of the complaint or that a verdict be directed for defendant, we are not permitted to search the evidence for its sufficiency in support of the verdict. *Barrett* v. *Third Ave. R. Co.*, 45 N. Y. 628; *Schwinger* v. *Raymond*, 105 id. 648.

On plaintiff's direct examination he was asked "For what purpose did you call upon defendants after they had refused the thermometers?" This question was allowed against objection by defendant's counsel, but in view of the fact that the witness had theretofore testified to the purport of his visit without objection, the answer was mere reiteration. No ground of defendant's objection was given and so the exception is ineffectual. *Cruikshank* v. *Gordon*, 118 N. Y. 178.

Alfred M. Beadleston, a witness for defendant, was asked on his direct-examination "Did he (meaning plaintiffs' agent) say anything as to whether any other brewer had such thermometers?" This was clearly leading and so properly excluded; but assuming the exclusion of the question to have been error, it was waived, and the exception thereto rendered ineffectual, by the witness' testifying, without objection, to the next two following questions of defendant's counsel: "Go on and state anything else he said," and "Was anything said as to other breweries having these thermometers, and if so, what?" *Neil* v. *Thorn*, 88 N. Y. 270, 277; *Crosby* v. *Day*, 81 id. 242.

The remaining exceptions present but one question and

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may, therefore, be considered collectively. The defense was that at the time of entering into the contract for supply of the thermometers, Beadleston, representing the defendant corporation, stated to Bonnell, plaintiffs' agent, that defendant desired an advertising medium for the brewing business of novel and original design in that line of business; that Bonnell represented that plaintiffs had not theretofore supplied any brewer with the thermometers; that, relying upon the truth of this representation, he (Beadleston) was induced to make the contract on defendant's behalf; and that it subsequently transpired that the representation was false and untrue. Beadleston's testimony tended to establish this defense and to disprove it plaintiffs were permitted to introduce evidence from which it appeared that thermometers had for a considerable time before the making of the contract been extensively and notoriously used, in the city of New York and elsewhere, as an advertising medium in a variety of businesses other than that of a brewer. To the introduction of this evidence defendant objected on the ground that the fact in issue was whether, or not, thermometers had been previously used as an advertising medium in the brewing business, not whether, or not, they had theretofore been used for such purpose in any business. The objection was overruled, and due exception taken.

We are of the opinion that the evidence was properly admitted. The credibility of a witness is always in issue, and evidence of any fact which tends to impeach it, or to demonstrate the improbability of the truth of his assertions, is relevant to the issue and admissible. Beadleston, having concluded the contract for defendant, was chargeable with its improvidence and directly interested in its avoidance. His credibility was for that reason a main element for the consideration of the jury in reaching a conclusion concerning his alleged motive in making the contract and his communication of that motive to plaintiff's agent. *Canajoharie Natl. Bank* v. *Diefendorf*, 123 N. Y. 191. Evidence tending to show that thermometers had, for a long time before the contract

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with defendant, been in general use as a medium of advertisement unquestionably affected the probability of the truth of Beadleston's assertion that he was induced to make the contract because he wanted a medium "of novel and original design" in the brewing business, and the jury were at liberty to infer therefrom that the claimed importance of the exclusion of thermometers as a means of advertising from other breweries, was a mere subterfuge resorted to by defendant to rid itself of a contract improvidently made by its agent.

The judgment appealed from should be affirmed, with costs.

Daly, Ch. J., and Pryor, J., concur.

Judgment affirmed.

Ketcham *v.* Cohn.

(New York Common Pleas — General Term, February, 1893.)

Defendants, having excavated their lot to a depth of twenty-two feet, made a contract with an experienced contractor to shore up the southerly wall of the adjoining building occupied by the plaintiffs. The employees of this contractor entered upon the premises of the plaintiffs without their authority or permission, broke open the wall of the building, put large beams or needles through the wall and upon the premises, and did material damage to plaintiffs' property. No claim was made that the work of shoring up was negligently or improperly done, or that it could have been done in any other way than that employed. In an action of trespass, *held*, that the defendants were liable equally with the contractor.

Chapter 6 of the Laws of 1885, does not modify the owner's common-law right to make excavations upon his own land, but merely imposes upon him a statutory duty which he is bound to perform on the condition named in the law. But neither said statute nor any other rule of law gives the party making the excavation, liberty or license against the will of the owner of the adjacent lot to commit a trespass upon his premises.

Appeal from a judgment of this court, entered on the verdict of a jury rendered at trial term, and from an order denying a motion to set aside the verdict and for a new trial.

Nathaniel Myers, for defendants (appellants).

Eugene S. Ives, for plaintiffs (respondents).

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BOOKSTAVER, J. In the spring of 1882, the plaintiffs were copartners composing the firm of A. W. Ketcham & Co., wholesale dealers in millinery goods, and were the lessees and occupants of the ground floor and cellar of the premises No. 632 Broadway, New York city. At the same time, the defendants were the owners of the adjoining premises on the south, Nos. 628 and 630 Broadway, and were causing an old building upon those premises to be torn down and a new one to be erected in its stead, making excavations for that purpose to a depth of twenty-two feet below the curb. This action is brought for the trespass alleged to have been committed by the defendants upon the plaintiffs' premises by their act of shoring up the building occupied by the plaintiffs to prevent it from falling into the excavation upon their lots. To do this shoring, defendants made a contract with one Goodwin. The employees of this contractor entered upon the premises of the plaintiffs, broke open the wall of the building, put large beams or needles through the wall and upon the premises of the plaintiffs, and as appears by the testimony, this caused material damage to the property of the plaintiffs. It was not claimed that the work of shoring up was negligently or improperly done or that it could have been done in any other way than that employed. One of the plaintiffs testified that he could not state any other way in which that building could have been shored up, and the testimony of Goodwin, the contractor, is to the same effect. The evidence further shows that the building occupied by the plaintiffs was, for a distance of nearly 100 feet back from the Broadway front, an old three-story brick building, and that its foundations extended only some nine feet below the curb, while on the rear of the premises was merely a one-story frame extension without foundations, and resting immediately upon the ground. And it is very apparent from the testimony in this case that the southerly wall of the building occupied by the plaintiffs must have fallen but for the shoring up. At the close of plaintiffs' case, the defendants moved for the dismissal of the complaint, and the like motion was made at the close of the whole case,

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both of which were denied, and defendants excepted. The defendants also requested the court to charge the jury: (1) "If the plaintiffs refused to afford Mr. Goodwin or the defendants the necessary license to enter on their premises and to do such things as were necessary to preserve the southerly wall of No. 632 Broadway from injury and to properly support the same during the excavations upon No. 630 Broadway, and if, by reason of the condition and location of said wall at the time when said excavations were commenced, the said wall was in danger, if such excavations were made, of falling upon defendants', premises, the defendants had a right to protect themselves against such an occurrence and are not liable to the plaintiffs for such act of themselves, or their subcontractors or servants, as were necessary to prevent the same, provided said acts were free from negligence." (2) "If the plaintiffs forbade Mr. Goodwin or his employees from entering their premises for the purpose of preserving the southerly wall of 632 Broadway and supporting the same during the excavations upon the defendants' premises, such action had the same effect upon the rights of the parties to this action as a refusal by the plaintiffs to afford a license for that purpose, and if by reason of the condition and location of said wall at the time when said excavations were commenced, the said wall was in danger, if such excavations were made, of falling upon the defendants' premises, the defendants are not liable to the plaintiffs for such acts of themselves, or their subcontractors or servants, performed without negligence, as were necessary to prevent such falling of such wall." (3) "If the plaintiffs refused to afford the necessary license to enter their premises and to do such acts as were necessary to preserve the southerly wall of 632 Broadway from injury and to properly support the same during the excavations upon No. 630 Broadway, or forbade Mr. Goodwin from entering their premises for that purpose, the defendants are not chargeable for acts done without negligence, which were necessary to prevent the said wall from falling upon their premises, or at most are chargeable only with nominal damages therefor."

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The court refused to charge these requests, and exceptions to such refusal were duly taken by the defendants.

The chief question involved by these refusals to the charge of the court are: *First.* Was any trespass committed? *Second.* If a trespass was committed, are the defendants liable for the acts of the persons who committed the trespass? and, *Third.* Were the plaintiffs damaged by the trespass, and in what amount?

The first of these questions is one of fact. The appellants concede that certain persons employed by Mr. Goodwin, the contractor, entered upon the premises of the plaintiff. This entry would constitute a trespass if unauthorized. The appellants, on the trial, contended that such persons entered by virtue of a license and permission of the plaintiffs. Whether or not the appellants had such license, a permission to enter upon their premises was fully and fairly presented to the jury by the learned judge who tried the case. The evidence on behalf of the plaintiffs that no license or permission had been given, was positive, and, in our judgment, sufficient to warrant the jury in finding in favor of the plaintiffs on that contention, and, consequently, their finding is binding upon us and we must conclude that a trespass had been committed.

We then come to the consideration of the question of whether or not the defendants are liable for the acts of the persons who committed the trespass, and this is the chief one to be determined on this appeal. It appears from the testimony that the defendants made a contract with the firm of F. & S. E. Goodwin to do the shoring necessary to erect the buildings, 628 and 630 Broadway. It further appears that Mr. Goodwin is one of the most experienced shorers in the city of New York. He testified: "After forty years' experience, I know of no other way in which I could have shored up that brick wall, the south brick wall of 632 Broadway, than the way which was employed." It was the employees of Mr. Goodwin who committed the trespass by reason of which the plaintiffs were damaged, and this was so charged at the request of the defendants. There

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is no proof to the effect that Mr. Goodwin did not do his work with skill and diligence; therefore, the necessary effect of the contract whereby the defendants employed Mr. Goodwin was the trespass and damage consequent thereupon. It is the well-settled law of this state that if the work done under a contract necessarily produces an injurious result, the person for whose benefit the work is done cannot shield himself by showing that it was done by an independent contractor. *Dorrity* v. *Rapp*, 72 N. Y. 307; *Town of Pierrepont* v. *Loveless*, 72 id. 211. It is also the well-settled rule in other states, and is well expressed by the court in the case of *Atlanta & Florida R. R. Co.* v. *Kimberly*, 87 Ga. 161, also reported in 27 Am. St. Rep. 231. The general rule of law upon this subject, says the learned justice delivering the opinion of the court, is: "Where an individual or corporation contracts with another individual or corporation exercising independent employment, for the latter to do a work not in itself unlawful or attended with damage to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders except as to the result to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor, or any of the contractor's servants. To the general rule there are several exceptions. Where the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor. This is upon the principle that if one contracts with another to commit a nuisance, he is a trespasser by reason of his directing or participating in the work. In other words, the rule is that if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workmen, the proprietor is not liable; but if the injury directly results over the work which the contractor engaged and was authorized to do, he is equally liable with the contractor." See, also, *Blake* v. *Ferris*, 5 N. Y. 48; *Pack* v. *Mayor, etc.*, 8 id. 222; *Kelly* v. *Mayor, etc.*, 11

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id. 432; *Herrington* v. *Lansingburgh*, 110 id. 145. And it seems to follow from this that the defendants in this case were liable for the trespass of Goodwin's employees.

But appellants contend that the trespass, if a technical one, was for the benefit of the plaintiffs, and to minimize the damage which they otherwise would have sustained by the doing of a lawful act upon their own premises, which necessarily involved some loss to the plaintiffs, and were not entitled either at common law or under the statute, to have a building occupied by them supported by the soil of the adjoining premises, and consequently no damages can be recovered by them for injuries which they have sustained solely through the excavations made upon such premises; relying on *Dorrity* v. *Rapp*, 72 N. Y. 307. It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property; but the mode of enjoyment is necessarily limited by the rights of others, otherwise it might be destructive of their rights altogether. As was said in *Hay* v. *Cohoes*, 2 N. Y. 159, where the defendants, a corporation, dug a canal upon their own land for the purposes authorized by their charter, and in doing so it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon the land adjoining — "the defendants had the right to dig the canal, the plaintiff the right to the undisturbed possession of his property. If these rights conflict, the prior must yield to the latter, as the more important of the two, since upon grounds of public policy it is better that one man should surrender the particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle, for if the defendants in excavating their canal in its lawful use of its land, could in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and

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thus deprive him of all use of his property. The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others and the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of lawful trade. *Aldred's Case*, 9 Coke, 102. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner. In Raleigh's Abridgment, 565, it was said that if A. erects a new house upon the confines of his land next adjoining the land of B., and B. afterwards dug his land so near the land of A. that it falls, no action can be sustained by A. The purpose of B. in the case stated, in digging upon his own land, was lawful, and so for aught that appears, were the means taken to accomplish it. The right of A. to occupy and use his land in a particular manner was qualified and limited by a similar right in B. No action, consequently, could be sustained. A man, however, cannot dig his land so near mine (adds the reporter) as to cause mine to slide into the pit. In the last case the injury would consist in depriving one of a part of the soil to which his right was absolute. No degree of care in the excavation by the pitowner, would, I apprehend, justify the transfer of a portion of another's land to his own." And the doctrine of *Hay* v. *Cohoes*, 2 N. Y. 159, has ever since been sustained in this state. *Pixley* v. *Clark*, 35 N. Y. 520; *Losee* v. *Buchanan*, 51 id. 476; *Marvin* v. *Brewster Iron Mining Co.*, 55 id. 538, 538; *Jutte* v. *Hughes*, 67 id. 267, 273; *Heeg* v. *Licht*, 80 id. 579, 583; *Herrington* v. *Lansingburgh*, 110 id. 145. See, also, *Prentice*

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v. *Gieger*, 9 Hun, 353; *O'Riley* v. *McChesney*, 3 Lans. 282; *Gourdier* v. *Cormack*, 2 E. D. Smith, 202; *Farrand* v. *Marshall*, 21 Barb. 414.

Chapter 6, Laws of 1885, providing "That whenever excavations hereafter commenced, for building or other purposes, on any lot or piece of land in the city and county of New York, and the city of Brooklyn, shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall, wholly or partly on adjoining land and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury," does not modify the owner's right to make excavations upon his own land as it existed by common law, but merely imposes upon him a statutory duty which he is bound to perform on the conditions named in the law; the right to excavate remains intact; the only effect of the act is to give a new assurance to the owner or occupant of the adjacent lot. But neither it nor any other rule of law that we are aware of, gives the party making the excavation, liberty or license against the will of the owner of the adjacent lot to commit a trespass upon his premises. The appellant argues as if he was under the necessity of fate to excavate his lot to the depth he desired, and that he had no alternative but to do so. Yet the necessity was entirely of his own creation. He could do it or not as he saw fit. Having himself determined to do it, he must take the responsibility of such determination. He need not have shored up the adjacent wall, and if he had excavated his own premises in a careful and lawful manner, he would not have been responsible to the plaintiffs for any injury they might have sustained by reason thereof. But that appellants contend that the shoring up was necessary for the safety of their employees, and without such shoring up the work could not be done. If this were so, then as was said in *Hay* v. *Cohoes*, 2 N. Y. 159, he

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must abandon that mode of using his property or be held responsible for all damages resulting therefrom. Besides, in this case, he did not confine himself to his own land; he actually entered upon the land of the respondents by inserting the needle in the walls of the building occupied by them. And in the case last cited it was expressly held that he could not enter upon the land of his neighbor for any such purpose.

Appellants also contend that the damages sustained by the shoring up of the plaintiffs' wall, ought not to have been allowed at more than a nominal amount, because the acts done by them, even if there was a trespass, were without malice and largely for the purpose of minimizing the injury which the plaintiffs would otherwise have suffered. But whatever damage the plaintiffs did suffer was not *in mortum* or *ex necessitate*, but arose from the voluntary act of the defendants, and whatever the amount of it, they must be responsible for it.

We, therefore, think the exceptions taken to the refusal to dismiss the complaint and to the refusals to charge, were not well taken. We arrive at this conclusion with reluctance, for its effect cannot but be to retard the growth of large cities and put obstruction in the way of the erection of larger, more beautiful and substantial buildings in the place of dilapidated and antiquated ones, when the owners of adjacent property are so churlish as to refuse permission to shore up as provided by the act before mentioned, or where the landlord of the adjacent property has let it to tenants and the permission of both cannot be obtained. To us it seems as if the views of the late learned Judge Bronson in *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 203, were wise and far-seeing and tended to the benefit of the public even if at some loss and inconvenience to private individuals. In the course of that opinion he said: "But still I think the reasoning unsound (referring to the respective rights of adjacent owners), especially in reference to properties in cities and large towns. If the doctrine were carried out to its legitimate con-

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sequences it would often deprive men of the whole beneficial use of their property. An unimproved lot of land in the city of Brooklyn would be worth little or nothing to the owner unless he were allowed to dig in it for the purpose of building, and if he may not dig because it will remove the natural support to his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor. A city could never be built under such a doctrine. I think the law has superseded the necessity for negotiation by giving every man such a title to his own land that he may use it for all the purpose to which such lands are usually applied, without being answerable for the consequences, and provided he exercises proper care and skill to prevent any unnecessary injury to the adjoining landowner. The saying of Rolle may have been a wise one in his day, but it is not well adapted to our times." But as before shown this view of the law has not been sustained in this state, and we must follow the law as we understand it, leaving it to the legislative authority to correct any evils that may lie in the law as it now exists and is expounded by the courts.

Other exceptions were taken by the appellants during the course of the trial, but none of them were argued by either counsel upon the appeal either orally or in his brief, and we do not, therefore, think it necessary to examine them at length.

The judgment should be affirmed with costs.

DALY, Ch. J., and BISCHOFF, J., concur.

Judgment affirmed.

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Carroll *v.* O'Shea.

(New York Common Pleas—General Term, February, 1893.)

Exceptions to the admission of evidence are not available where the ground of the objection is not stated.

When plaintiff rests, any defect in proof is cured by evidence received after denial of a motion to dismiss the complaint.

Failure to renew a motion for dismissal or to ask for the direction of a verdict concedes the sufficiency of the evidence for submission to the jury.

An exception to the denial of a motion for a new trial is ineffectual for any purpose where the case contains no order denying defendant's motion, on the minutes, for a new trial.

No appeal lies to the General Term of this court from an order of the City Court refusing a new trial.

Appeal from a judgment of the General Term of the City Court of New York, affirming a judgment for plaintiff which was entered upon the verdict of a jury.

Action to recover broker's commissions on the sale of real estate.

Wandorf H. Phillips, for plaintiff (respondent).

Fellows, Gray & Hartman, for defendant (appellant).

Bischoff, J. Neither of defendant's exceptions to the admission of evidence is available on appeal because the ground of the objection is not stated. *Cruikshank* v. *Gordon*, 118 N. Y. 178.

Any defect in the proof when plaintiff rested could be and was cured by evidence adduced by either party after denial of defendant's motion for dismissal of the complaint (*Schenectady & Saratoga R. Co.* v. *Thatcher*, 11 N. Y. 102, 112; *Tiffany* v. *St. John*, 65 id. 315, 317; *Painton* v. *Northern Cent. R. R. Co.*, 83 id. 7); and defendant's failure to renew the motion, or to ask that a verdict be directed in his favor, conceded the sufficiency of the evidence for submission to the jury. *Barrett* v. *Third Ave. R. R. Co.*, 45 N. Y. 628; *Schwinger* v. *Raymond*, 105 id. 648.

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The case contains no order denying defendant's motion on the minutes for a new trial, and an exception only to the denial of such a motion, is ineffectual for any purpose. *Matthews* v. *Meyberg*, 63 N. Y. 656; *Boos* v. *World Mut. L. Ins. Co.*, 64 id. 236.

Besides no appeal lies to this court from an order of the City Court refusing a new trial. Code Civ. Proc. § 3191; *Wilmore* v. *Flack*, 96 N. Y. 512; *Smith* v. *Pryor*, 16 Daly, 169.

The judgment appealed from must be affirmed, with costs.

DALY, Ch. J., and PRYOR, J., concur.
Judgment affirmed.

CREAM CITY FURNITURE CO. *v.* SQUIER.

(New York Common Pleas—General Term, February, 1893.)

A notice of mechanic's lien was verified in Milwaukee, state of Wisconsin, before a commissioner for the state of New York, and filed in the New York county clerk's office without having attached thereto the certificate of the secretary of state that the person taking the verification was a commissioner for the state of New York. After the commencement of an action to foreclose the lien, it was taken from the files of the county clerk's office and the said certificate attached. *Held*, that the notice was insufficient to create a lien.

APPEAL from so much of a judgment entered at the equity term of this court, as dismissed the complaint as to Louise Squier and the Squier & Whipple Co., and adjudged a paper purporting to be a mechanic's lien invalid.

John C. Tomlinson, for plaintiff (appellant).

Alexander Thain, for defendant (respondent).

BOOKSTAVER, J. This action was brought to foreclose a mechanic's lien, and the first question to be determined on this appeal is whether the paper purporting to be the notice of mechanic's lien was, when filed in the county clerk's office,

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sufficient to create a lien or not. All the other questions raised by the appeal depend upon this one.

The Mechanics' Lien Act, chapter 342, Laws of 1885, section 4, provides that in order to effect a lien, a notice of the lien containing certain facts must, within a certain time limited, be filed in the county clerk's office in the county where the property is situated, and that this notice of lien must be verified. If it is not verified when filed it is a nullity. *Conklin* v. *Wood*, 3 E. D. Smith, 662, where it was held that a defective verification was fatal to the lien and could not be amended. *Keogh* v. *Main*, 50 N. Y. Super. Ct. 183; *Grey* v. *Vorhis*, 8 Hun, 612.

In this case the notice of lien was verified before a commissioner for the state of New York in Milwaukee, Wis.; and was filed in the New York county clerk's office, without any certificate of the secretary of state that the person taking the verification was a commissioner for the state of New York; nor was such authentication supplied until sometime after the commencement of this action, when it was taken from the files of the county clerk's office and the certificate of the secretary of state was attached to it. Verification out of the state is purely statutory, and in this case is regulated by section 4 of chapter 270 of the Laws of 1850, which provides that before any affidavit taken before a commissioner out of the state "shall be entitled to be used, recorded or read in evidence, in addition to the preceding requisites (relating to verification), shall be subjoined or affixed to the certificate signed and sealed by such commissioner as aforesaid, a certificate under the hand and official seal of the secretary of this state, etc." The notice, therefore, was not entitled to be used, recorded or read in evidence. *Florance* v. *Butler*, 9 Abb. Pr. (N. S.) 63; *Harris* v. *Durkee*, 5 Civ. Proc. Rep. 376; *Tim* v. *Smith*, 3 id. 347, affirmed by the Court of Appeals, 93 N. Y. 87.

But appellant contends that the verification was good as a verification without a certificate and that this is all the Mechanics' Lien Act requires. The difficulty with this posi-

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tion is that the law before quoted says that such a verification is not entitled to be used unless accompanied by the certificate. It is difficult to conceive how the filing of the notice was not a user of it within the meaning of this act; in fact it was the first use to which it could be put and the chief one, and created the lien if effective, provided it was subsequently followed by the other requirements of the Mechanics' Lien Act. Under section 844 of the Code relative to affidavits taken in other states, which provide that the same must be taken before an officer authorized by the laws of the foreign state to take and certify the acknowledgment and proof of deeds to be recorded in that state, and that such verification must be accompanied by a certificate of his official character and the genuineness of his signature, it has been held that the absence of such certificate makes the affidavit a nullity. See cases, *supra*, and *Phelps* v. *Phelps*, 6 Civ. Proc. Rep. 117, which was affirmed by the General Term, 32 Hun, 642. In *Irving* v. *Campbell*, 121 N. Y. 353, a certificate of acknowledgment proved by a subscribing witness omitted the place of residence of the subscribing witness; it had been received and recorded by the register, and when the record was sought to be used for the purpose of making and establishing title, it was said "we find no authorities holding that a material provision of the statute expressly required to be stated can be wholly disregarded, and a deed thus acknowledged lawfully admitted to record. That a deed improperly recorded cannot be read in evidence has been determined in numerous cases." Citing *Morris* v. *Keyes*, 1 Hill, 540; *Clark* v. *Nixon*, 5 id. 36. See, also, *Williams* v. *Culhane*, 22 N. Y. St. Repr. 42. And in 5 Am. & Eng. Enc. of Law, 443, the rule is laid down that "in order that a deed may be recorded and the record furnish constructive notice of the contents of the deed to subsequent purchasers, it must be acknowledged or probated before an officer duly authorized to take such acknowledgments or probates and the deed must contain a certificate to that effect.

In view of the cases cited, we think that *Lawton* v. *Kiel*, 51 Barb. 32, although frequently cited on other points, can no

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longer be regarded as authority for holding that the affidavit can be used without a certificate, especially in view of the fact that it was decided by a divided court.

There is still another difficulty with the plaintiff's case. The Mechanics' Lien Act, section 4, requires that a copy of the notice filed with the county clerk must be served upon the owner or other person interested by delivering a copy of that notice to him within ten days after the filing. As far as appears from the case, no copy of that notice, with a certificate of the secretary of state, was ever served upon the defendants. Besides, the secretary of state's certificate, as before shown, was not attached to the notice on file in the county clerk's office until some time after the commencement of this action.

Having arrived at this conclusion, it is unnecessary to consider the other questions raised upon this appeal, as they all fall with this one.

The judgment should, therefore, be affirmed with costs.

DALY, Ch. J., and PRYOR, J., concur.

Judgment affirmed.

TAYLOR *v.* SATTERTHWAITE.

(New York Common Pleas—General Term, February, 1893.)

The granting of an order of interpleader is discretionary, and unless it clearly appears that the discretion has been improperly exercised, an order denying a motion therefor should not be disturbed.

The owner of real estate having been sued by a broker for commissions for effecting a sale thereof, and also by another party for work, labor and services in the sale of the same property, applied for an order of interpleader under section 820 of the Code of Civil Procedure, which was refused upon the ground that both claimants were demanding the same debt. *Held*, that the granting of the order being discretionary its denial must stand.

Held further, that both claims, though arising from the same subject-matter, were in no sense conflicting.

APPEAL from an order at Special Term denying defendant Satterthwaite's motion for an order of interpleader under the provisions of section 820 of the Code of Civil Procedure.

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Action to recover brokers' commissions at the sale of real property. The opinion states the facts.

Theron G. Strong, for respondents Taylor et al.

John A. Dutton, for appellant Satterthwaite.

C. W. West, for respondent Read.

BISCHOFF, J. By express provision of section 820 of the Code of Civil Procedure a motion for an order of interpleader is addressed to judicial discretion. The granting of the order is, therefore, not a matter of right (*Barry* v. *Mutual Life Ins. Co.*, 53 N. Y. 536); and unless it plainly appears that the discretion has been improperly exercised by the judge at Special Term, his order denying the motion should not be disturbed.

To bring himself within the provisions of section 820 of the Code of Civil Procedure, defendant Satterthwaite had necessarily to allege that George R. Read, who was sought to be substituted as defendant in his stead, "makes a demand against him for the same debt," and "without collusion with him;" and to substantiate the allegation of a demand by Read, defendant's affidavit refers to Read's complaint in the Superior Court action. No other demand is alleged. From that complaint, however, it appears that Read's claim is for services rendered at defendant's request in and about the sale of certain real property, and from the complaint in this action, that plaintiffs claim commissions, as brokers, for having effected the sale. The claims, therefore, though arising from the same subject-matter, are in no sense conflicting. Both may be valid and subsisting at one and the same time. Hence from defendant's own showing a constituent ground for the motion is disproved. True, from Read's affidavit, which was submitted for the purposes of the motion, it appeared that he *then* asserted a claim for commissions for procuring the sale. But it does not appear that he had at any time prior thereto asserted a similar claim. His complaint in the Superior Court

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action is based upon essentially different grounds, and his affidavit is that of a person in interest. The learned judge at Special Term may, therefore, well have concluded that Read's claim for commissions was only made for the purpose of the motion, and collusively so, to secure an order of interpleader; and if so, it was not only his province, but also his duty, to deny the motion. The order appealed from should be affirmed, with costs.

PRYOR, J. The learned judge at Special Term assigned a single cause for the denial of the motion; but the order will be upheld if it may be supported upon any ground apparent in the papers. Nevertheless, we are quite satisfied that the reason given for the decision in question is sufficient to sustain it.

By the terms of the Code, section 820, an order of interpleader is allowable only when the competing creditors demand "the same debt or property." The thing about which these creditors are in controversy is a debt; and the question is as to the identity of the claims they respectively prefer. As the party sought to be substituted for the defendant has reduced his claim to the formality and certainty of a cause of action in a complaint, that statement of it, undoubtedly, is the most authentic exposition of its character.

Looking, then, to the complaints of the creditors proposed to be interpleaded, we find that they proceed upon essentially different claims or causes of action. The Taylors sue for brokers' commission as such; and accordingly they allege their employment as brokers to sell the property; a sale of the property; their effective agency in the sale; the customary commission for the sale of real property; and their complaint concludes with a demand of judgment for that specific commission. Read's action is for work, labor and services in the sale of the property; and, consistently, he omits the allegations as to the customary commission; that he was the procuring cause of the sale, and indeed, that a sale was actually consummated. To entitle a broker to his commission on a sale, he must be the procuring cause of the sale; but one

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employed only to render services in a sale may conceivably recover for those services, although he did not in fact negotiate the sale. *Hume* v. *Flint*, 16 Daly, 360.

The decisive test of the identity of debts is the identity of the evidence to support them; and here, manifestly to support the causes of action advanced by the claimants, would require a diversity of proof.

We are unable to affirm that the claims of Taylor and Read, respectively, against Satterthwaite constitute one and the same debt.

Another ground, apparent in the papers, affords sufficient support to the order. "To sustain an action of interpleader, it must appear that the plaintiff is ignorant of the rights of the respective claimants." *Trigg* v. *Hitz*, 17 Abb. 436; *Howe, etc.*, v. *Gifford*, 66 Barb. 599; *Morgan* v. *Fillmore*, 18 Abb. 217. The plaintiff must show that "he is ignorant which claimant has the better right." *Baltimore, etc.*, v. *Arthur*, 90 N. Y. 234, 237. In a letter to the Taylors, owners of the property sold, now moving for the interpleader, recited the facts of the transaction, and concluded: "I think, therefore, you will readily see, on these facts as now given you, that you are not entitled to a commission on the sale." The facts recited show to demonstration that the rival claimant was entitled to the commission.

Upon the defendant's own statement, there can be no reasonable doubt as to the validity of Read's claim, and of perfect security in paying the money to him; and this fact presents still another ground in support of the order. *Nassau Bank* v. *Yandes*, 44 Hun, 55.

But, although the defendant makes a case for interpleader, under the Code, it does not follow, of course, that the order will issue. It is still within the discretion of the court whether to grant the relief (*Barry* v. *Ins. Co.*, 53 N. Y. 536), and we are of opinion that in this instance an interpleader is inconsistent with a judicious discretion.

Before notice of the motion, Read had begun an action on his claim in the Superior Court. He had a right to select his

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forum; and it is a familiar rule that the court first acquiring jurisdiction, retains it to the end. Comity suggests that such court should not be molested or hindered in the disposition of the case by the action of a co-ordinate tribunal. It is answered that to interplead, Read, in the action depending in the Common Pleas, will in no way interfere with his action in the Superior Court. If that be so, then two actions for the same cause will be in agitation at the same time before different tribunals, and may result in contradictory judgments. In the Superior Court, it may be adjudged that Read is entitled to the money, and in the Common Pleas, that the Taylors recover the identical debt. Here would be an embarrassing conflict. If it be that the interpleader of Read in this court will not arrest his action in the Superior Court, the fact affords a conclusive reason why, in the exercise of discretion, we should not compel him to come hither. If, on the contrary, the effect of an order of interpleader be to detach the action from the control of the Superior Court, then do we oust their jurisdiction in regard of the comity which is indispensable to the harmonious co-operation of co-ordinate tribunals. *Grant* v. *Quick*, 5 Sandf. 612. In either alternative it would appear that our discretion had been improvidently exercised.

Nor is this all. It may be that, by compelling an interpleader, we should embarrass the claimants in maintaining their respective rights. For support of his action in the Superior Court, Read will undoubtedly rely on Satterthwaite's admission of liability to him; but would that be evidence against the Taylors? On the other hand, would a declaration of Satterthwaite, favorable to the Taylors, be competent evidence against Read?

Be this as it may, we are persuaded that the learned judge at Special Term discreetly exercised his discretion in denying the interpleader. Order affirmed, with costs.

Daly, Ch. J. (dissenting). The order for interpleader was refused upon the ground that the two claimants were not demanding the same debt. Code, § 820. The plaintiffs, as

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brokers employed to sell defendant's property, allege that by means of their services the property was sold to one George G. Havens, Jr., and they demand the customary brokers' commission. The other claimant has also sued the defendants upon a complaint alleging an indebtedness to him for work, labor and services as real estate broker, performed at the request of defendant in the sale of the same property.

Upon the face of the two complaints it might be questionable whether the latter action might not be for services other than procuring the purchaser Havens; but all doubt upon the subject is dispelled by the affidavits of the plaintiff in that action, George R. Read, and his employee, William McAllister. In those affidavits they show that Read sues for the "usual brokers' commissions for the sale of the house" to the purchaser above named. They swear to the employment and to effecting the sale, and Read says that his claim is for the usual brokers' commissions for the sale of the premises mentioned. With such affidavits it is impossible to deny that both claimants are after the same commission or debt. The learned judge at Special Term has decided upon the pleadings only, but these are controlled by the positive affidavits of the parties, showing that whatever vagueness there might be in the complaint of Read, his demand is the same as that of the plaintiffs in this action. It is urged that the defendant knows which party is entitled to the commission; but in the nature of things the owner of the premises cannot know that. The transactions of the purchaser were not had in his presence, and he can have but an opinion based upon information. Such an opinion he expressed in a letter to these plaintiffs, in which he states the facts he knows, and then concludes that the plaintiffs are not entitled to the commissions. But the merits of the respective claimants can only be ascertained when the two claimants adduce their proofs before a jury, as against each other, and this interpleader should, therefore, be allowed.

It is urged, as a reason for denying this motion for interpleader, that the claimant Read has begun an action in the Superior Court. No interference with that action will result

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from the order now applied for. The defendent here will pay into court the fund in dispute and leave the two brokers to contest their right to it. That will leave him still subject to the jurisdiction of the Superior Court, to which he must apply for any relief it may deem proper to grant him. The action in this court was the first one brought. Had the Superior Court acquired jurisdiction first, I should be in favor of withholding the interpleader in this action until a similar motion had been submitted to the court, as I think the application should be first made in the tribunal in which the defendant is first sued, and if made in good faith should be granted. To hold otherwise and decide that where the claimants have sued in different tribunals an insuperable objection to interpleader is presented, would enable claimants in every case to nullify the statute of interpleader and prevent the exercise by the courts of the discretion vested in them by the legislature for the ends of justice.

The order should be reversed and the motion for interpleader granted.

Order affirmed.

Fogel *v.* Derrickson.

(City Court of New York — General Term, February, 1893.)

Plaintiff procured for defendant, the retainer of parties defendant in a foreclosure action for which defendant agreed to give him a certain share of the compensation defendant would receive out of any net surplus arising on the sale in the action. After judgment, a motion by defendant to have the premises sold in parcels having been denied, he procured a stay of the sale, and commenced an action of partition for the same parties whose signatures plaintiff had obtained in the foreclosure suit, retaining defendant. In an action to recover a share of what defendant received in the partition suit, plaintiff had a verdict. *Held*, error; that his complaint should have been dismissed; the agreement with defendant limited any claim by plaintiff to the fee obtained by defendant in the foreclosure suit.

Appeal from a judgment in favor of plaintiff. The opinion states the case.

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Henri Pressprich, for plaintiff (respondent).

Samuel G. Derrickson, for defendant (appellant).

FITZSIMONS, J. The heirs of one William Cooper, who died seized of certain real estate in Westchester county, New York, were parties defendant in a certain action brought to foreclose a mortgage which was a lien upon the real estate of said Cooper deceased, Mitchell Valentine being plaintiff in said action.

The defendant herein, Derrickson, an attorney and counselor at law, represented William C. Cooper, one of the defendants in the foreclosure suit, and wishing to be retained by the other defendants, he engaged the plaintiff to procure a retainer from such defendants in his (Derrickson's) favor, and for that purpose entered into the following written contract with plaintiff:

"NEW YORK, *February* 13, 1891.

"This is to certify that I the undersigned agree to pay the just and full one-fourth of my compensation hereafter received from the heirs of William Cooper, deceased, with the exception of William C. Cooper, which may accrue by reason of a surplus over and above a mortgage indebtedness, and in an action wherein Mitchell Valentine is plaintiff, and Margaret Cooper and others are defendants, and I direct the referee therein to pay the same to the bearer, John P. Fogel, Esq., of No. 3369 Third avenue, in the city of New York, the said one-fourth of my share and charge the same to my account. Excepting the said William C. Cooper whose one-fourth interest belongs to me absolutely in which the said John P. Fogel does not participate therein; that the said John P. Fogel has rendered very valuable services in and to the estate of said Cooper, deceased, as well as to all of the heirs interested therein, and as a just recognition of such valuable services rendered I do hereby obligate myself as aforesaid.

"SAMUEL G. DERRICKSON

"Signed in the presence of

"A. E. COLGAN."

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The plaintiff, in pursuance of his employment under said agreement, procured the signature of several of the defendants in said foreclosure action, in which they agreed to pay Derrickson for his services as attorney therein one-fourth of the surplus moneys realized upon the sale of the mortgaged premises after deducting all of the expenses, cost, etc., of said suit.

The foreclosure action proceeded to judgment. Derrickson applied to have the mortgaged premises divided into lots and sold in parcels, as it was conceded by the defendants in said action that that was the best way to sell the land, that if the same was sold in bulk, it would probably realize no surplus over the mortgage debt of $8,000, and incidental costs and expenses.

Derrickson's application was denied and the property was ordered to be sold in bulk.

Derrickson then had the sale under the foreclosure suit stayed, and commenced an action in partition for the same heirs whose signatures the plaintiff had obtained in the foreclosure suit retaining defendant therein.

The partition suit was pursued to judgment, and sale thereunder was had, the premises being sold in parcels as suggested by Derrickson in the foreclosure action. The land sold in this manner for between $16,000 and $17,000.

The plaintiff states that the defendant told him he had received his share, one-fourth of the surplus, amounting to $2,500, and this suit is for $625, under the written contract first mentioned. The jury rendered a verdict for plaintiff for $500.

The written contract upon which the plaintiff relies for his right to recover herein is clearly based upon and relates only and solely to a fee or percentage which the defendant would receive out of any net surplus arising on the sale in the foreclosure action, and it limits any claim which plaintiff may have against defendant under their agreement to the fee obtained by defendant for his services in such suit.

Said agreement is not general in its terms, it does not invest in plaintiff a right to claim a part of any fee earned by defendant in any other action or proceeding.

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Plaintiff's claim against defendant is limited to the fee received by him from the sale in the partition action, which was not even thought of at the time of the execution of the agreement herein sued upon, is, in my opinion, to make and create for the parties a contract never contemplated by them.

This action if exercised by us would be wrong and a usurpation of power, and not a function or privilege of ours.

Courts cannot make contracts for litigants; they can only construe and interpret contracts made by the litigants themselves.

As it is conceded that the defendant only received out of the foreclosure action $150, no part of which the plaintiff is entitled to, and that all the other moneys received came out of the sale in the partition suit, I believe that defendant's motion to dismiss the complaint herein should have been granted, and that it was error for the trial justice to refuse to do so.

The judgment must, therefore, be set aside and the complaint dismissed, with costs.

McGown, J., concurs.

Judgment accordingly.

STREBELL *v.* J. H. FURBER CO.

(City Court of New York — General Term, February, 1893.)

In an action to recover a balance due on contract, the complaint alleged full performance on plaintiff's part. The answer denied full performance, and alleged and pointed out in what particulars and in what respect plaintiff failed to perform. *Held*, that the answer amounted simply to a general denial, and that no claim was made against plaintiff entitling him to a bill of particulars.

APPEAL from an order made December 2, 1892, requiring the defendant, J. H. Furber Co., to furnish a bill of particulars.

Charles A. Lavett, for defendants (appellants).

Bartlett, Wilson & Hayden, for plaintiff (respondent).

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McGown, J. This action was brought to recover a judgment against defendants, for the sum of fifty dollars balance alleged to be due on a contract, made between the defendants J. H. Furber Co. and the plaintiff, dated March 29, 1892, whereby plaintiff agreed to do all the mason work, brick work, stone work, plastering, fire-proof partitions, and iron work, and to furnish the materials necessary thereto, except bridle irons, on the rear window guards of the first floor, in building number 46 Baxter street, for the sum of $2,600, on which the sum of $2,550 has been paid as alleged, and also to recover the sum of $180 for extra work.

Plaintiff, in the fifth paragraph of his complaint (folio 21), alleges: "That he has fully performed his contract," and demands judgment for the sum of $230 and interest.

Defendant J. H. Furber Co., in its answer, admits the making of a written contract on the 29th day of March, 1892, and in the third paragraph of its first separate defense of its answer (folio 53), "It denies that the plaintiff fully performed his said contract, * * * but, on the contrary thereof, alleges that he did not perform said contract in this, that he did not furnish and put up fire escapes or furnish the brick work, or the plastering, nor did he clear out the building or cart away the dirt as required by the terms of the said contract, nor furnish all the lath, plaster, lime and other materials necessary therefor."

On December 2, 1892, on motion made by plaintiff's attorneys, an order was made, "That the attorneys for the defendant deliver to the plaintiff's attorneys a bill of particulars of the claim set forth in paragraph three of the first separate defense of the said defendant's amended answer to the complaint herein, that the plaintiff did not furnish the brick work or plastering, or furnish all the lath, lime and other materials necessary therefor, * * * within six days * * * or on default thereof, that he be precluded from giving any evidence on the trial in support of said claim." Folios 88, 89, 90.

From this order the defendant J. H. Furber Co. appeal.

Section 531 of the Code provides that "The court may *in*

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any case direct a bill of particulars of the *claim of either* party."

The plaintiff alleges full performance; this is denied by the defendant in the first portion of its answer (folio 53), thus raising an issue upon the question of *full performance* on the part of the plaintiff, which *full performance* plaintiff is bound to prove before he can recover.

The defendant, in denying full performance; in addition alleges and points out in what particulars and in what respect plaintiff failed to perform.

It does not by so doing make any claim against the plaintiff for which plaintiff was entitled to a bill of particulars.

That part of defendant's answer in which it points out in what particular respect plaintiff failed to perform, is not affirmative in its character, but amounts simply to a general denial of full performance, pointing out in what particulars plaintiff failed to perform.

The answer, in an expansive manner, contains simply a general denial, and, therefore, the case is not one for a bill of particulars. See *Gray* v. *Shepard* (Supreme Court, General Term), 13 N. Y. Supp. 27.

The defendant, in its answer, virtually admits performance of the contract, with the exceptions stated in its answer; and the plaintiff would only be required to prove performance of the particular items mentioned in order to make out a *prima facie* case.

The defendant makes no claim against the plaintiff, which would require any proof on its part, to sustain its defense, until plaintiff had proven full performance, when it could, to rebut any evidence showing full performance, introduce evidence to contradict any such evidence, on the part of plaintiff.

In *Goddard* v. *Pardee Medicine Company*, 52 Hun, 85, a similar question arose. In that case, an action was brought to recover for advertisements, alleged to have been made, under a contract with the defendant. The complaint alleges performance of the contract. The defense was, "That the

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advertisement of the defendant was not published pursuant to said contract; that the said contract was not performed, and that the papers therein mentioned were not received, checked and verified as therein provided."

The plaintiff moved for a bill of particulars on the ground that he could not tell in what particulars the defendant intended to maintain that the advertisement was not published in accordance with the contract, or what papers therein mentioned were not received, checked and verified in accordance with the agreement.

The bill of particulars was refused, on the ground that this was not a proper case in which a bill of particulars should be required.

Justice BARTLETT, in his opinion at page 86, says: "The fourth defense in the answer is not affirmative in its character. It really amounts to nothing more than a denial of the plaintiff's alleged cause of action. It adds no strength to the answer and could be wholly stricken out, without detriment to the rights of the defendant. Considering it, therefore, with reference to its legal effect, which is simply that of a denial, it cannot properly be regarded as setting up any such claim as to render it proper to require a bill of particulars. The plaintiff counts upon the contract and is bound to prove a performance thereof before he can recover in the action.

"Such proof is essential to make out the plaintiff's case, and he cannot avoid the obligation to furnish it, because the defendant has put its denial of due performance in a somewhat more specific form than was necessary."

Justice BARTLETT in his opinion, distinguishes the case from *Dwight* v. *Germania Life Insurance Company*, 84 N. Y. 493 (cited by respondant in his brief), and referring to the definitions stated in above case, says at page 87: "None of these definitions includes a mere denial or a statement of fact, which amounts only to such a denial, and which comprises nothing more than what the defendant could have shown if he had contented himself with a simple denial in form." See, also, *Rafalsky* v. *Boehm*, 1 Misc. Rep. 87.

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In this case an order sustaining a bill of particulars was sustained, inasmuch as the answer did not contain *a general denial*, etc. *Kelsey* v. *Sargent*, 100 N. Y. 603, also cited by respondent, is not in point.

In that case, the action was brought to compel the surrender of certain stock, which the plaintiff alleged had been pledged by plaintiff to defendant, as security for the payment of a promissory note, and also to save defendant from certain guaranties executed by him.

The complaint alleged payment of the note, and that defendant "was made free and discharged from all his contracts as guarantor." The answer denied said averment and alleged "that the defendant has not been released from liability on said guaranties and is still liable on *three or more* of such guaranties."

An order was made requiring defendant to serve "a bill of particulars of the *guaranties upon which he claims to be liable, as alleged in the answer*."

The order was sustained on appeal. In its *per curiam* opinion the court held that, "in either case the plaintiff might require further information before trial, and whether it should be obtained from a more specific answer or a bill of particulars was for the Supreme Court to determine."

The order for a bill of particulars was improperly granted, and should be reversed, with costs to the respondents to abide the event.

Van Wyck, J., concurs.

Order reversed.

Rainsford *v.* Temple.

(City Court of New York—General Term, February, 1893.)

A judgment debtor is guilty of contempt if after service upon him of the usual order in supplementary proceedings, he borrows money and pays the same to creditors.

Appeal by defendant from an order adjudging him guilty of contempt.

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Forster & Spier, for plaintiff (respondent).

James K. Averill, for defendant (appellant).

FITZSIMONS, J. This is an appeal from an order adjudging defendant guilty of contempt. The defendant, a judgment debtor, was served with the usual order in supplementary proceedings on April 6, 1892. His examination commenced April twelfth and continued to May twentieth.

Between April sixth and May twentieth defendant deposited in his bank several hundred dollars, to which he held the legal title.

This money was withdrawn from his bank by persons in whose favor he drew checks in payment of debts which he owed them.

This he has no right to do even if, as he stated, some of the money deposited so by him was loaned for the purpose of paying out the same to his debtors, as he did by the checks mentioned.

The moment the money reached his hands, he became the legal owner thereof, and was forbidden by the injunction contained in the supplementary proceeding order served upon him to interfere with the fund mentioned.

Having paid out said fund in the manner described, in violation to said order, he was guilty of contempt, and the order appealed from was properly made, and is affirmed with costs.

McGOWN, P. J., and VAN WYCK, J., concur.

Order affirmed.

WEISS *v.* BLOCH.

(City Court of New York — General Term, February, 1893.)

In an action against partners for goods sold and delivered, the evidence of one partner that he purchased the goods for the firm, corroborated by another witness for plaintiff, justifies the direction of a verdict for plaintiff, although the other partner testifies that the goods were not so purchased but were put into the firm by his partner as part of the capital stock.

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APPEAL from a judgment in favor of plaintiff, entered upon the verdict of a jury by direction of the court, and from an order denying defendants' motion for a new trial.

The exceptions taken on the trial, to be heard in the first instance, at the General Term by order of the trial justice.

M. A. Vosburgh, for plaintiff (respondent).

Goldfogle & Cohn, for defendants (appellants).

McGOWN, J. The action was commenced to recover $228 for goods alleged to have been sold and delivered to the defendants, as copartners, doing business under the firm name "Bloch & Wise," on or about the 1st day of November, 1891. Defendant Bloch in his answer, denied each and every allegation in the complaint, excepting that the defendants were copartners on the day alleged in the complaint, November 1, 1891. The defendant Wise appeared but made default in pleading. Plaintiff's witness, Joseph H. White, testified to the sale and delivery of the goods in question to the defendant Simon Wise and that the reasonable value thereof was the sum of $228. The defendant Simon Wise, called as a witness on the part of the plaintiff, testified: "That he was a member of the late firm of Bloch & Wise, and that said firm purchased the goods in question a few days after the partnership was formed, and that he told defendant Bloch that he (Wise) had bought the goods and that Bloch said we could use the braid." Defendant Bloch in substance testified, that *he* did not purchase the goods, but that the goods in question were put in as part of his (Wise's) capital stock, and testified that he saw the goods in defendants' store. No other evidence was offered on the part of the defendants. The defendants' counsel asked that the case be submitted to the jury on the fact as to whether the copartnership firm purchased the goods. The court directed a verdict in favor of the plaintiff for the amount claimed, $228. There was no error committed by the trial justice in directing the verdict, as there was no question of fact to be submitted to the jury. The defendant Wise

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testified, that *he* purchased the goods for the firm, and his evidence was corroborated by the witness White.

Defendant Bloch testified that "there were no goods whatever purchased *to my knowledge* after Wise went in there, by Wise or by me, from these people."

Wise, the defendant, as a partner, had full power to purchase goods for the firm of Bloch & Wise and upon such purchase, said firm become liable therefor.

The judgment and order appealed from must be affirmed, with costs to the respondent.

VAN WYCK and FITZSIMONS, JJ., concur.

Judgment and order affirmed.

CLARK *v.* TRYON.

(City Court of New York—General Term, February, 1893.)

The holder of a promissory note cannot recover against the indorser when he does not prove that notice of dishonor was given to the defendant, and seeks to bring himself within the statutory exceptions, unless he alleges and proves the facts necessary to constitute the exception.

In an action against an indorser of a promissory note, the complaint alleged due notice of demand of nonpayment and protest was given defendant. The answer denied the allegations. *Held*, that evidence to prove excuse for failure to protest was inadmissible in the absence of an averment of that character in the complaint.

APPEAL from a judgment entered on the verdict of a jury in favor of the plaintiff, on the 9th day of May, 1892, for the sum of $310.98, and also from an order denying the motion for a new trial.

Francis M. Scott, for plaintiff (respondent).

Hahn & Myers, for defendants (appellants).

MCGOWN, J. This action was brought upon a promissory note made by Christopher B. Keogh and Henry C. Smith, copartners, dated July 30, 1892, payable three months after

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date, to the order of the defendant Frank Tryon, at the Bowery Bank, for the the sum of $186.05.

The complaint alleges the making of the note, its delivery to defendant Tryon, its indorsement by Tryon before maturity and delivery to the Kentucky Union Lumber Company, and its subsequent transfer to the plaintiff.

Plaintiff alleges in his complaint, "that he is informed and believes, that when said note became due and payable, it was duly presented for payment to the said makers thereof, at the said Bowery Bank, and payment thereof was duly demanded, but the same was not paid, and said note was duly protested for nonpayment; that due notice of said demand of nonpayment and protest was given to the defendant." And also alleges the nonpayment of the note.

Defendant in his answer, admits the making of the note, his indorsement, and the delivery thereof to the Kentucky Union Lumber Company, and the nonpayment thereof. Denies its transfer to plaintiff, and that the plaintiff is now the owner and holder thereof, and "*Third.* This defendant denies that he has any knowledge or information sufficient to form a belief that the note was duly presented for payment to the makers thereof, at the Bowery Bank, and payment thereof demanded, and that said note was duly protested for nonpayment.

"*Fourth.* He denies that due notice of such demand, nonpayment and protest was given to this defendant."

Defendant served with his answer, an affidavit that he has not received notice of nonpayment of the note.

The note became due on October 30, and November 2, 1890.

Upon the trial, the note was put in evidence by the plaintiff, and plaintiff offered in evidence a letter written by the defendant to the Kentucky Union Lumber Company, dated December 10, 1892.

In the letter defendant says: "If you positively refuse to do so, I shall not take any advantage of the failure of the notice of protest, and will pay the note, but, well — put yourself in my place, and act accordingly."

Defendant's counsel objected to its admission, as incompe-

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tent, etc., "and that it is not within the pleadings, they being for a protest, not for a subsequent promise to pay; and that is what we came here to defend."

The objection was overruled, and letter admitted in evidence, and marked plaintiff's exhibit "B," to which ruling defendants' counsel excepted.

The jury returned their verdict in favor of the plaintiff. The question raised upon appeal is as stated in the appellant's brief: "Can the plaintiff, declaring against the indorser on presentation and protest of a promissory note in due form, prove excuse for failure to protest without any averment of that character in the complaint?"

In *Clift* v. *Rodger*, 25 Hun, 39, the same question arose and was passed upon. The action was upon a promissory note made by one Margaret A. Rhoades and indorsed by defendant. The complaint, among other things, alleged "that said note was then and there duly protested for nonpayment, of all which the said defendant Rodger had notice." The plaintiff, upon the trial (before a referee), failing to prove that notice of dishonor of the note was given to the indorser (the defendant), sought to recover by showing that no notice was necessary, and that defendant was liable as indorser by reason of having taken the security of the maker, etc. Evidence was admitted by the referee of certain facts with a view of showing that no notice of protest was necessary after it appeared that no notice of dishonor of the note was given to the indorser. The evidence was objected to and received against the defendant's exception. HARDIN, J., in his opinion, says: "As a general rule, notice of presentment and nonpayment must be given to an indorser, as a condition precedent to a recovery against him. The exceptions to this rule are laid down in the cases in the state to be where: (1) The indorser has taken a general assignment of the maker's property. (2) Where there has been a waiver of the notice of protest, or it clearly appears that the absence of the notice did not, and could not, work injury or damage to the indorser. * * * The question presented sharply in this

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case is: Can a holder recover when he does not prove notice of dishonor, and seeks to bring himself within one of the exceptions, without avering the fact or facts necessary to constitute the exception? We have seen that without such proof the holder has no cause of action. * * * In case he is not able to make proof of notice of dishonor, he needs to prove other 'fact or facts,' and to that end he should aver the fact or facts, which form an essential part of his cause of action. * * * The proof, we have seen, was essentially part of the plaintiff's case, and without such 'proof he could not recover,' and without an averment of the 'fact or facts' *constituting* his cause of action, he ought not to be allowed to make the needed proof." The judgment was reversed, all the judges concurring with HARDIN, J.

In *Garvey* v. *Fowler*, 4 Sandf. 667, in a similar case, all the judges concurring with DUER, J., hold that as the plaintiff would be bound to prove such "fact or facts," he must aver them in his pleading.

Neither of the above cases, as far as we can ascertain after a careful examination, have ever been reversed, distinguished or modified.

We have also examined all the cases cited by respondent's attorney in his brief, and find nothing therein to change or modify the rulings in the cases above cited.

The admission in evidence, therefore, of the letter of defendant, plaintiff's exhibit "B," by the trial justice was error, and the judgment and order appealed from must be reversed, with costs to the appellant to abide the event.

FITZSIMONS, J. I concur, because plaintiff was required to prove notice of protest; under the issue herein he could not show any excuse for failure to give such notice.

Judgment reversed.

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Hassett *v.* McArdle.

(City Court of New York—General Term, February, 1893.)

If the record shows any evidence, however slight, tending to prove plaintiff's case, it is error for the trial court to dismiss the complaint or order a nonsuit.

In such case, the court should not grant a nonsuit on the assumption that plaintiff's witnesses are not to be believed, but is bound to assume the facts which plaintiff's evidence legitimately conduces to prove, although their correctness may be controverted by the evidence for defendant.

Appeal by plaintiff from judgment dismissing the complaint as against defendant McArdle.

Hyland & Zabriskie, for plaintiff (appellant).

Cardoza Bros., for defendant (respondent).

Van Wyck, J. Plaintiff's action is to recover damages for breach of a contract made as alleged by M. Donnelly & Co., then composed of the two defendants, Michael Donnelly and Peter J. McArdle. The defendant McArdle appeared at trial and defended, but the defendant Donnelly did not.

After the close of plaintiff's evidence and before defendant rested his case, he moved to dismiss the complaint and the court dismissed as against defendant McArdle, and directed a verdict against defendant Donnelly, who did not defend at trial. The plaintiff duly excepted and took this appeal from the judgment of dismissal against McArdle. This was a nonsuit and will be reviewed as such. If the record shows any evidence, however slight, tending to prove the plaintiff's cause of action against defendant McArdle, it was not within the power of the court below to dismiss the complaint or order a nonsuit; nor could the nonsuit have been granted on the assumption that plaintiff's witness is not to be believed, but the court was bound to assume the truth of the facts which plaintiff's evidence legitimately conduces to prove, although their correctness may be controverted by the defendant's evidence.

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Plaintiff's evidence shows that the contract on the breach of which this action is founded, was signed M. Donnelly & Co. on November 27, 1890, by defendant Donnelly, in the presence of and under the direction of Stephen, the son of defendant McArdle, and in the place of business at 134 Leroy street, this city, upon which the sign was "M. Donnelly & Co., Rails, Scrap Iron and Metals," and that printed at the top of this contract was the same firm and business description, and that the contract was for the transportation by plaintiff of 200 tons of iron for said firm. It is undisputed that Donnelly and McArdle were copartners on November 7, 1889, and as such were then carrying on the business of buying and selling rails, scrap iron and metals, at this same place, 134 Leroy street. The defendant Donnelly, who was called by plaintiff, testified that he and McArdle continued as such copartners until March 18, 1891, when McArdle caused to be published in the New York *Herald* a notice of dissolution as by mutual consent and that after November 7, 1889, he, Donnelly, had as much right there as he had ever had before. This evidence, standing alone, is certainly a *prima facie* case for plaintiff as to defendants' liability as copartners.

However, while Donnelly was under cross-examination by counsel for defendant and at defendant's request an agreement was marked in evidence as defendant's exhibit No. 1, and which was signed by Donnelly, dated November 7, 1889, consenting to a dissolution of the firm of M. Donnelly & Co., carrying on the rail and scrap iron and metal business at 134 Leroy street, and assigning all of his title to said firm and its assets to defendant McArdle, and further consenting (why his consent was necessary if the sale was *bona fide* does not appear) that McArdle's son Stephen should take charge of the business at 134 Leroy street. The plaintiff duly objected to this agreement being marked in evidence by defendant, and certainly he was not bound by it, but it was a part of defendant's evidence to contradict the witness Donnelly, and at best, only impeached his credibility, for Donnelly in explanation, testified that he gave the bill of sale (this agreement so designated in record) for

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protection, that he signed it, "but I still had as much right there as I ever had before. I signed the paper, but I never sold my rights there;" the business continued in the name of M. Donnelly & Co.; that after this bill of sale was made the firm of M. Donnelly & Co. continued to do business the same as it did before and did over a million dollars afterwards, and that both he and McArdle signed M. Donnelly & Co. to notes in the bank, and then continuing under cross-examination, he testified that as late as "in 1891, I claiming to be a member of the firm of M. Donnelly & Co., brought an action in the Supreme Court, against Patrick J. McArdle, for an accounting." It is true, however, that defendant was again allowed to put in a part of his evidence while cross-examining this witness, for he had marked in evidence as his exhibit No. 2, the judgment only, in that Supreme Court action, which was merely a nonsuit, and could not bind this plaintiff, who was not a party to that action, and hence had no legitimate bearing upon this case.

The nonsuit in this action should not have been granted and the judgment is reversed, with costs to appellant to abide the event.

McGown, J., concurs.
Judgment reversed.

Lee v. Corn.

(City Court of New York — General Term, February, 1893.)

The affidavit of M. averred that defendant, while negotiating a purchase of goods from M.'s principal, stated, among other things, that his firm owed no other borrowed money, and that relying upon the truth of said statement and believing that defendant's firm owed all told for merchandise $27,500, to two banks $25,000, and no other borrowed money, as stated, sold and delivered goods to defendant's firm. That, in fact, deponent is informed and believes that at the time said statement was made, defendant's firm were owing other persons from $10,000 to $15,000 borrowed money; that the sources of deponent's information and grounds of belief are contained in the annexed affidavit of B. In B.'s affidavit no proof appeared that the indebtedness of

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defendant's firm to the other persons was for borrowed money. *Held*, that plaintiff's papers were insufficient to sustain the order of arrest.

A judgment for goods sold and delivered, until vacated and the action discontinued, is a bar to an action for deceit in contracting the liability for the purchase price.

APPEAL by plaintiffs from an order of the Special Term vacating order of arrest.

J. B. Marshall, for plaintiffs (appellants).

Paul Wilcox, for defendants (respondents).

VAN WYCK, J. This appeal is by Lee, Tweedy & Co., plaintiffs, from the order vacating an order of arrest granted October 5, 1892, upon the affidavits of James Morris and Louis J. D'Auby, two of their employees, against Meyer Corn, one of the defendant copartners, upon the ground that he, by false and fraudulent representations, induced plaintiffs to sell to his firm goods of the value of $1,024.19. The defendant Corn moved to vacate upon two grounds: (1) On the insufficiency of plaintiffs' papers; (2) On affidavits showing that on June 11, 1892, in an action then pending in Supreme Court, these plaintiffs entered final judgment (still in force) against these defendants for the value of these same goods and in the very sum of $1,024.19. Now, as to the first ground of objection, Morris, in his affidavit, avers that defendant Corn "while he was negotiating with deponent for the purchase of the goods from Lee, Tweedy & Co. for Corn, Kaliske & Co., among other things, he made the following false and fraudulent statement as to the credit and financial standing of the firm of Corn, Kaliske & Co.: "owed other borrowed money $, none." That relying upon said statement and the truth thereof, and believing that said defendant's firm owed, all told, for merchandise $27,500, to two banks $25,000, and that they owed no other borrowed money, as stated by him, deponent, for the firm of Lee, Tweedy & Co., sold and delivered to defendants between the 1st day of March and

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the 1st day of July, 1892, goods, wares and merchandise of the value of $1,024.19. That in truth and in fact deponent is informed and believes, at the time that this statement was made, defendant's firm were owing for other borrowed money from ten to thirty-five thousand dollars, which indebtedness was in favor of Heyman Vogel and Henry Vogel, * * * and that the sources of deponent's information and the grounds of his belief as to the falsity of the statement made by Meyer Corn, as aforesaid, are contained in the affidavit of Louis J. D'Auby, which said affidavit is hereto attached and made part of the moving papers herein." The only express averment in Morris' affidavit of a positive statement made by defendant Corn is that he stated that his firm "owed other borrowed money $, none." However, the affidavit says that Corn made this statement, "among other things," but does not specify what these "other things" were. It is true that deponent says that he believed "that said defendant's firm owed, all told, for merchandise $27,500, and to two banks, $25,000," but he does not aver that Corn stated that his firm owed, all told, for merchandise, $27,500, and to two banks, $25,000, and hence he states no facts as the foundation of such belief on his part. But assuming only for argument that the averment had been that Corn stated that his firm owed, all told, for merchandise, $27,500, and to two banks, $25,000, and that they owed no other borrowed money, what positive proof is there that this statement was false? Morris avers that he is informed and believes that this statement was false, and that defendant's firm, at the time this statement was made, were owing for other borrowed money, from $10,000 to $35,000, which indebtedness was in favor of Heyman Vogel and Henry Vogel, but he further avers that the sources of his information and the grounds of his belief in this regard are contained in the annexed affidavit of D'Auby, and hence in this later affidavit must be sought and found proof of the falsity of Corn's assumed statement. And D'Auby's affidavit is in full as follows: "That he was present in the Special Term of the City Court on the 30th day of

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September, 1892, when Meyer Corn, one of the defendants herein, testified in supplementary proceedings, in which Julius Franklin and others were plaintiffs, and Meyer Corn and others were defendants, as follows: Q. As near as you can tell, what is the largest sum your firm owed at any one time to Heyman Vogel? A. Between $40,000 and $50,000. The smallest sum was $10,000. I suppose firm was never out of his debt until confession of judgment was given. Q. As near as you can tell, what was the largest sum owed to Henry Vogel at any one time? A. About $25,000. Smallest sum about $10,000. Q. How long was your firm indebted to Henry Vogel in the sum of $10,000 or more? A. Since shortly after the organization of defendants' firm."

And in all of the foregoing, no proof appears that this indebtedness of Corn's firm to either Heyman or Henry Vogel was for money borrowed by his firm, and viewing the same in the most favorable light to plaintiffs' contention as regards the amounts due from Corn's firm to Heyman and Henry Vogel on March 27 and April 6, 1892, the days upon which the statements were made by Corn to plaintiffs' employee, Morris, proof can only be seen of an indebtedness by Corn's firm of $10,000 each to Heyman and Henry Vogel, and for all that appears in proof, these two sums may have been owing for merchandise, and may have been a part of the $27,500 which Morris says he believed was owing by Corn's firm for merchandise. Thus is reached the conclusion that plaintiffs' papers were insufficient to sustain the order of arrest. As to defendant's second ground of objection against the continuance of the order of arrest, it would seem that it was plaintiffs' duty, as soon as they obtained knowledge that defendant was guilty of fraud in contracting or incurring the liability, to first discontinue their Supreme Court action in which the judgment had been obtained against the defendants for the purchase price of the goods, and then to commence this action upon the complaint, alleging the fraud of defendant in contracting the liability for the purchase price of the goods. If a suit be discontinued at any stage, and the judgment vacated,

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then the adjudication therein concludes no one, and it is not an estoppel or bar in any sense.

The order appealed from is affirmed, with costs.

McGown and Fitzsimons, JJ., concur.

Order affirmed.

Rieger v. Swan.

(City Court of New York—General Term, February, 1893.)

On review at General Term of the clerk's taxation of costs, the defendant cannot raise the point that there was insufficient proof before the clerk when the same was supplied at Special Term without objection on his part.

Appeal by defendant from order of Special Term on motion to review clerk's taxation of costs.

Van Wyck, J. Plaintiff's bill of costs noticed for taxation before the clerk on March twenty-fourth contained this item of disbursement "Paid copy stenographer's minutes $13.60," and the only averment in the affidavit annexed, to justify the taxation of this item, is that deponent (plaintiff's attorney) "says that the foregoing disbursements have been made or incurred in this action." To the taxation of this item defendant duly objected but the clerk overruled the same and taxed the item without first requiring plaintiff to make further proof specifying the grounds upon which the item might be allowed as a reasonable and necessary expense, for it seems that such further proof was not made before the clerk, although an affidavit verified on the same day and made on behalf of plaintiff appears in the appeal book, and in which is specified the best grounds to have justified the clerk in allowing the item as reasonable and necessary, but the affidavit upon which defendant obtained the order to show cause why this taxation should not be reviewed by the court at Special Term, avers that the affidavit annexed to the bill of costs contained the only proof made by plaintiff before the clerk and upon

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the hearing on this review; plaintiff makes no denial of this averment and hence we must assume that Nanz's affidavit, although verified on March twenty-fourth, was not used on taxation before the clerk and was first read on March twenty-seventh upon the hearing at Special Term in review of the taxation. And so assuming, the conclusion is reached that the Special Term should and would have reversed the clerk's ruling and disallowed this item if defendant had objected to the use of Nanz's affidavit on such hearing in review, for the established rule is that the court at Special Term acts in such matters as an appellate tribunal. In other words, the appeal is only intended to review the errors actually committed by the clerk, on the proof before him, at the time of taxation, and he cannot be put in error or justified by proofs furnished to the court afterwards unless the party seeking the review waives his right to object to the making of such additional proofs at Special Term, and such party is deemed to have so waived this right by failing to object. The record does not show that defendant objected to the supplying at Special Term of the additional proofs by Nanz's affidavit. The general rule is that defects and errors which, if pointed out, may have been supplied or avoided below, will not be available on appeal. It would be manifestly unjust to permit an objection for the first time at General Term which the party had every opportunity to present at the Special Term and which, if made, might have been obviated. If this defendant had objected at Special Term to the supplying of the additional proof to justify the allowance of the item of disbursements objected to by him it could have been obviated, for the court at Special Term had, under section 3265 of the Code, the authority to send the matter back to the clerk with instructions for him to allow this contested item upon the proofs as contained in this very same affidavit, for this section says that upon such review of taxation by the court "it may direct a new taxation before the proper officer, specifying the grounds or *the proof*, upon which the item may be allowed or disallowed by him." The order appealed from should be

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affirmed, but as the clerk in allowing the contested item upon the proofs before him at the time of the taxation was in error, the defendant should not have had costs awarded against him, and the order, in so far as it so awards costs, is reversed and otherwise it is affirmed.

FITZSIMONS, J., concurs.

Ordered accordingly.

CRAWFORD *v.* TYNG.

(City Court of New York—General Term, February, 1893.)

Upon the question of the value of an attorney's professional services it is error to read in evidence the opinion of the appellate court affirming a judgment against the client, if objected to; it is also error to incorporate an extract of the opinion into a hypothetical question to be put to an expert witness as to the value of the services.

APPEAL by defendant from judgment for plaintiff entered on verdict of a jury and from order denying new trial.

Jacob Fromme, for plaintiff (respondent).

Alexander Thain, for defendant (appellant).

VAN WYCK, J. The plaintiff's action is for the recovery of $1,000 on contract and defendant counterclaims on contract for $1,000, the value of his professional services rendered as the attorney of record and counsel for this plaintiff in the action in Supreme Court of *Mayor, etc.*, v. *Crawford*, 47 Hun, 639, in which this plaintiff was the defendant. Defendant's professional services were rendered at the trial of that case at Circuit, the hearing on appeal at General Term, and on the hearing of the final appeal in the Court of Appeals. The plaintiff's most vigorous defenses at trial, to this counterclaim, were that the services were worth nothing because "any lawyer who had the least skill could have decided that there was no defense" to that action, and because this defendant "had acted in bad faith" in interposing a defense for this plaintiff in that action, and in continuing such defense on appeal first to the General Term and then to the Court of

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Appeals which affirmed the judgment rendered at trial against Crawford. The plaintiff, against defendant's objection and exception, was allowed to substantiate these defenses to the counterclaim by reading in evidence the opinion of Judge FINCH of the Court of Appeals upon the decision affirming the judgment in *Mayor, etc.*, v. *Crawford* (folio 64), and again at folio 94, against the same objection and exception, his counsel was allowed to incorporate an extract of over two hundred words from this same opinion into a hypothetical question put to a lawyer who was on the witness stand as an expert as to value of the services, and upon which he was asked to give his opinion as to the value of the services rendered by defendant. This opinion read in evidence, and the extract from the same incorporated into the hypothetical question, contained Judge FINCH's reasons for the decision, and these reasons as given in the opinion undoubtedly influenced the jury in the verdict returned against the defendant for the full amount claimed by plaintiff, and that they were so influenced it would seem to appear from the following extract of the record at folio 179: "Defendant's counsel—I ask you to charge that there is no evidence of bad faith on the part of Mr. Tyng in acting as counsel for Mr. Crawford. The Court—I will leave that to the jury because of the opinion of the Court of Appeals. [Defendant excepts.] Defendant's counsel—I ask your honor to charge that the Court of Appeals make no suggestion of any bad faith on the part of the counsel in defending the suit. The Court—I will leave that to the jury. [Defendant's excepts.]" This opinion, which was improperly admitted in evidence, is at best the declaration (secondary evidence) made by the court of its reasons for making the decision, and moreover, the judge writing an opinion in a given case is simply giving the reasons for his decision, and even if called as a witness will not be allowed to testify as to his reasons for reaching his decision, although he may be allowed, under certain circumstances, to testify as to what occurred before him; but the order or judgment entered on his opinion is the best evidence of the adjudication.

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The safest rule to follow is, that the whole record is the highest evidence of what the court decided, and the record alone is binding, even if the opinion contains adverse expressions. Thus, if the opinion gives the best of reasons for holding with the plaintiff, but the judgment entered thereon is in favor of the defendant, it cannot be attacked collaterally, and will ever remain as the highest evidence of the adjudication until it is vacated or reversed. The judgment and order appealed from are reversed and a new trial granted, with costs to appellant to abide the event.

McGown, J., concurs.

Judgment reversed, new trial ordered, costs to abide event.

Hecht *v.* Brandus.

(City Court of New York — General Term, February, 1893.)

Plaintiff's contract of employment with defendant, for five years, stipulated that defendant might terminate it at any time on payment of $2,000, and that upon breach of the agreement by either party, he should forfeit $2,000 to the other as liquidated damages. At the end of two years defendant closed the business and dismantled his factory. In an action to recover the $2,000, *held*, that plaintiff was entitled to recover, and that his obedience of defendant's instructions to shut down and dismantle the factory was not a waiver or release by him of defendant's obligations under the contract.

Defendant afterwards went into another business and offered plaintiff employment for the remainder of his term of service. *Held*, that plaintiff was not bound to accept it.

Appeal by defendant from judgment for plaintiff entered on verdict directed by the court.

Cantor, Linson & Van Schaick, for plaintiff (respondent).

William R. Bronk, for defendant (appellant).

Van Wyck, J. Plaintiff's action is upon a written agreement between him and defendant, made on November 1, 1889, whereby Brandus, plaintiff, engages for five years the services of Hecht, defendant, as general manager of his busi-

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ness of manufacturing and dealing in fancy silverwares, and agrees to pay him therefor a sum equal to twenty-five per cent of the net profits of his said business, and covenants with said Hecht that said amount shall not be less than $2,080 during each year, and to make up and pay any deficiency if the same shall not amount to said sum; and the said Hecht hereby accepts said appointment for the period stated, and agrees to give his entire time and devote his utmost skill, energies and ability to the advancement of said business, and to accept for his services the share of the profits above stated." The defendant, in pursuance of the contract, embarked in the business with plaintiff as his general manager, but being disappointed in its results, first made unsuccessful efforts to sell the same, and then determined to run it no longer, and dismantled his factory, and finally abandoned his business about three years before plaintiff's term of employment would have expired by the terms of the contract. Hence this action by plaintiff to recover $2,000 as liquidated damages under the following provisions of the original agreement:

"Brandus shall have the right of terminating this agreement at any time upon the payment of $2,000 to said Hecht, and a share of the profits up to the time of such termination. Either party committing a breach of this agreement shall forfeit to the other $2,000 as liquidated damages, and not as a penalty, to be recovered by him in an action at law." It is undisputed that defendant, by his letter of December 1, 1890, notified plaintiff, his general business manager, as follows: "Personally, I am positively through with the business, and will run it no longer," and "please close down." It was the servant's duty to obey these instructions from his master, and his obedience in this respect was the master's breach of the agreement as regards the continuance of the master's business and servant's employment. And as the factory was immediately closed down and its dismantlement begun, and the whole business was finally abandoned and closed on March 7, 1891, the plaintiff had an immediate cause of action for $2,000 under the above provisions of the agreement, unless he,

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as appellant contends, had abandoned, released or waived defendant's obligations under the agreement to continue the business and plaintiff's employment for five years, or to pay the plaintiff $2,000 as stipulated damages for failure to so continue the business or employment, or for terminating the agreement as provided for therein.

The appellant's main contentions as to abandonment, release or waiver by plaintiff of defendant's obligations under the agreement, are that defendant's letter of November 18, 1890, is, in itself, such release or waiver and if not so, in itself, then it is the foundation upon which a waiver or release by estoppel can be built from the subsequent acts of defendant in discontinuing his business and plaintiff's employment, and in terminating the agreement, and which were induced by this letter and plaintiff's acts and conversations. The appellant insists that plaintiff's willing obedience to defendant's instructions to shut down and dismantle his factory was a waiver or release by him of defendant's obligations under the agreement to continue the business under plaintiff's management for five years. But such obedience cannot be so construed, first, because plaintiff was a servant, and such instructions came from his master, and secondly, whether servant or copartner, the plaintiff had no legal right to object, for he had by the contract conceded to defendant the absolute right to terminate the agreement, or to discontinue the business or employment whenever he saw fit to do so, and upon the exercise of such right he became liable to plaintiff in $2,000. Now as to this letter of plaintiff. The defendant, at folios 150 and 151, testified that before he had received this letter he had "lots of times" directed plaintiff to sell the business, and had "asked him to do all he could to sell it." This letter treats almost solely of plaintiff's efforts to make a sale of the business as instructed by defendant, and in it plaintiff says: "You (defendant) ask me what are my views as to my future; frankly, I had not given that a thought, but I certainly expect to perform all my obligations to you," and then makes reference to going into some other business with defendant if

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this business is sold out. The defendant testifies, at folio 140, that after receipt of this letter "Mr. Hecht, we looked around for several different kinds of business, but we did not enter into any of them." After all of these efforts of the defendant and his servant to make a sale of the silverware business and factory, and to embark in some other kind of business, had finally failed, we find the defendant, as was his legal right, assuming full and absolute control of his affairs and himself determining to shut down and dismantle his factory and abandon the business, without any regard to the previous unsuccessful efforts of himself and servant to sell the same and embark in another business, for he writes plaintiff, who is still his servant, on December 1, 1890, that "if you are through manufacturing at the factory, please close down, as it is useless to make me pay the pay rolls every Saturday, if (I don't know) we have no orders. Personally I am positively through with the business and will run it no longer;" and again on December 3, "I don't wish to retain anybody at all at the factory, except Michael, until Christmas. I want to stop all expenses, even one dollar. Therefore, sell all of our stock this month, with a profit, if possible; at cost, or below, if compelled. The reason I am determined to close up the business, is that this year has proven the *worst* of any, except first year; that I don't want to pay out one single dollar more." It was not only plaintiff's right, but his duty to carry out, to the letter, these instructions from his employer; and in so doing, he in no way released or waived any of defendant's obligations under the original agreement, while a failure to so do would have rendered him personally liable to his employer for all resulting approximate damages, as well as to all subsequently-employed subordinates who might fail to hold the defendant liable for their wages, by reason of this revocation by him of plaintiff's former authority. The plaintiff, in obedience to these instructions, finally closed out the business and factory, and delivered the keys to defendant on March 7, 1891. But the appellant contends that plaintiff was bound to accept employment from him and his part-

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ner in the publishing business, for the remainder of the term, at forty dollars per week, because defendant testified, at folio 143, that he, at the time the keys were delivered, told plaintiff to have a talk with Hastings, defendant's partner, about his employment by them; while Hastings, on behalf of defendant, testified that he had offered plaintiff employment as a salesman in their publishing business at forty dollars per week for remainder of his unexpired term. The plaintiff was under no obligation to accept this employment, for defendant's liability to him for $2,000, as liquidated damages had already been fixed, and moreover, he could not be forced to abandon the business of manufacturing silverware, in which he had twenty-five per cent of the net profits, as compensation for his services, and to accept employment as a salesman in the publishing business at the rate of forty dollars per week. And the proof is clear that plaintiff did not accept this latter offer, for the defendant, at folio 144, testified that the plaintiff said to him, immediately after this interview with his partner, "Mr. Brandus, Mr. Hastings has mentioned the subject about the publishing business, my being employed in it, and I must say I have not looked at my contract, or considered it any, and I will give you an answer on Monday at one o'clock." The answer which plaintiff gave on Monday, will be found at folio 64, and says: "Agreeable to my promise to let you have my reply to-day, I beg to say that I decide to stand by the contract made between us, and shall expect payment of the $2,000, in accordance with the contract." In the view of the transactions and obligations of the parties, which has herein been taken, it appears that there were no disputed questions as to any material facts, and that the facts which appellant was prevented from proving were immaterial to the legitimate issues of the case, and hence, that the court properly directed a verdict for plaintiff for the $2,000, less the counterclaim, which was not denied. The judgment and order are affirmed, with costs.

McGowan and Fitzsimons, JJ., concur.

Judgment affirmed.

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McQuhae *v.* Rey.

(City Court of New York — General Term, February, 1893.)

A husband is not liable for attorney services rendered his wife in proceedings prosecuted by the people against him for nonsupport.

Fromme Bros., for defendant (appellant).

L. A. Gould, for plaintiff (respondent).

Fitzsimons, J. The defendant, a married man, refused and failed to support his wife; she applied to and received from the commissioners of charities and correction of this county authority to proceed as complainant against the defendant, for nonsupport. After due proceedings were taken he was required to give a bond as required by law for her support and maintenance, by a police justice. The plaintiff's assignor rendered legal services in said proceedings, and the plaintiff now seeks to recover the value of such service upon the theory that they were necessaries supplied the wife, and consequently he is liable therefor. A wife it is true has the right to procure necessaries, and her husband is bound to pay therefor, and it has been frequently decided that legal services rendered to the wife fall within that term, but an investigation of all such cases will show that the wife was a party as plaintiff or defendant in the action for which the husband was held liable to the attorney for the value of his legal services. Such services were rendered the wife in prosecuting or defending her marital relations, and for that purpose she was justified in procuring the services of a lawyer, and his services were deemed *necessaries* just as much as necessary food, fuel, shelter and clothing would be, but it is to that extent, and that extent only, that a husband is liable. In the proceeding in which the legal services sued for herein were rendered, the defendant's wife was not a party nor were her marital rights under consideration. It was a proceeding prosecuted by the people

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against the defendant for his failure to provide for her, and thus causing her to be a possible charge upon the county, and such was the issue and the only issue possibly involved therein. She was only a witness therein, not a party thereto. She had no right to engage counsel in that proceeding. The people had its legal representative in the person of the corporation attorney; if he was not actually present during the progress of said proceeding, it was not because his presence was not necessary; he was present in the eye of the law; his absence, however, would not authorize the defendant's wife to procure other counsel and cause him to be liable for legal services rendered. All the authorities cited by respondent, and which he claims makes the defendant liable herein, are as before stated based upon the fact that the services for which the husband was held liable were rendered to the wife in civil actions wherein she was compelled for the purpose of protecting her status and rights as a married woman to call to her aid a lawyer. None of the cases cited go so far as to say that a husband is liable for legal services rendered to his wife in a proceeding brought by the people against him for a violation or failure on his part to do a legal duty towards her in which she was merely a witness for the people, and their rights only being violated or threatened. The defendant would only be liable for the services rendered by plaintiff's assignor upon the theory that the same were *needed* by his wife. How could they be *needed* when she was not a *party* but only a witness in the abandonment proceedings which are authorized by the Criminal Code, and for the purpose of preventing her from becoming a charge upon the county, and in which as before stated the corporation attorney is appointed by law to appear as counsel for the people, so that it is very apparent that she *needed* no counsel. The legal services rendered her were not *necessary*, but entirely *unnecessary*, and, therefore, the husband is not liable therefor, no matter how valuable they were to the wife. Under the circumstances above related, the plaintiff has no cause of action against defendant for the legal services rendered. The ordering of a new trial would be a

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useless formality. The judgment herein is reversed, and the complaint dismissed upon the merits, with costs.

McGown, J., concurs.

Judgment reversed.

McHugh v. Astrophe.

(City Court of New York — General Term, February, 1893.)

An equity action may by order be taken from its regular place upon the calendar and put upon short cause calendar as a preferred cause.

It is immaterial that the order recites that the trial shall take place in a part of the court where equity causes are not tried, if in fact it appears on the calendar of the proper part and is answered to by the attorneys.

The respondent failed to pay motion costs awarded appellant by a prior General Term. *Held*, that the order should be reversed, with leave to renew upon payment of said costs.

Appeal from an order. The opinion states the case.

Emile B. Morel, for plaintiff (respondent).

Booram, Hamilton & Beckett, for defendant (appellant).

Fitzsimons, J. This being an equity action, the trial must be without a jury. The order appealed from does not attempt to take away that right.

The action was ordered for trial as a preferred cause on the short cause calendar, which is in the court a calendar made up of equity causes and actions on contract that may be tried within one hour.

The fact that the said order recites that the trial shall take place in part two instead of part four, the latter being the equity trial part, is inconsequential, plainly a clerical error, and was so regarded by the calendar clerk and the attorneys for the parties hereto, because the action was actually placed on part four calendar, and there appeared and was answered to by said attorneys.

The justice sitting in that part when it appears for trial will try it without a jury, as are all equity actions tried.

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The justice who made the order had a right to do so, if in the interests of justice he deemed it proper to order a speedy trial herein.

The appellant cannot complain, having received due notice of trial.

Any cause may be taken out of its regular place on the calendar by the court and made a preferred cause, and a speedy trial ordered, if, as above stated, justice so requires.

This is an inherent right which the court has, and does not depend upon nor is it restricted by any section of the Code of Civil Procedure. *Smith* v. *Keepers*, 5 Civ. Proc. Rep. 66.

The only objection to the order is, that respondent failed to pay the costs awarded appellant by a prior General Term of this court.

The costs so awarded were motion costs, and until paid, all proceedings of respondent are stayed by virtue of section 779 of the Code of Civil Procedure.

For this reason the order appealed from must be reversed, but without costs, with leave to respondent to apply again for such an order upon payment of the unpaid costs just mentioned.

McGown and Van Wyck, JJ., concur.

Order reversed.

UNITED BUILDING AND LOAN BANK *v.* BARTLETT.

(City Court of New York — General Term, February, 1893.)

The law will not compel a party to do that which he cannot do.

Defendant in his affidavit positively swore to his inability to comply with an order requiring of him a bill of particulars. Plaintiff did not contradict defendant's affidavit nor show in any manner that the defendant could give the information asked for. *Held*, that an order directing a bill of particulars to be given should be reversed.

APPEAL from an order made on the 9th day of December, 1892, requiring defendant to serve a further and additional bill of particulars.

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David Leventritt, for plaintiff (respondent).

Lardner & McAdam for defendant (appellant).

McGown, J. The complaint alleges that between and inclusive of the months of March and December, 1891, the plaintiff paid over to the defendant, and the defendant received and obtained from the plaintiff, the sum of three hundred and thirty-eight and seventy-five-hundredths dollars ($338.75) which the defendant agreed to devote to, and to use in the payment and discharge of certain expenses in the conduct of the business of the plaintiff, as the same might during said period accrue. That the defendant in violation of said agreement did not devote said money, or use the same, or devote or use any part thereof, in the payment of any of the said expenses, but on the contrary, he converted and appropriated the same to his use. Also alleges demand, before the commencement of the action, made upon defendant to refund and repay same, and the neglect and refusal so to do, and that defendant has reserved and appropriated the said sum to his own use, to plaintiff's damage of three hundred and thirty-eight and seventy-five-hundredths dollars ($338.75), for which amount it demands judgment. The defendant in his answer, denies the conversion, and denies that he has reserved and appropriated the said sum for his own use, and admits the demand and his refusal to refund and repay same to the plaintiff, and alleges that he was appointed cashier of the said plaintiff, and was authorized to expend out of the moneys to be furnished him, the sum of ten dollars ($10) in each and every week for the expenses of, and attendance at the office of the plaintiff; also that during the time mentioned in plaintiff's complaint, plaintiff paid to him as such cashier, for the purpose aforesaid, divers sums of money, amounting to said sum of three hundred and thirty-eight and seventy-five-hundredths dollars ($338.75), and that the same was thereafter and from week to week, during the time aforesaid, wholly paid out and expended by him for the purpose for which the same was furnished to him

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as aforesaid. On or about November 19, 1892, in pursuance of a demand made by plaintiff's attorney, defendant served upon said plaintiff's attorney, a bill of particulars (verified) of moneys expended by him as follows:

"To paid to G. M. Muren, Esq., each week from March 23d, 1891, to and including September 19th, 1891, for his salary and his disbursements, for postage, express charges, advertising and incidental expenses, in the plaintiff's business, the sum of ten ($10) dollars, in all, twenty-six payments of ten dollars each.....	$260 00
"To retained by F. A. Bartlett, this defendant, to him, for postage and for his attendance at the office of the bank from September 19th, 1891, to November 14th, 1891.....	78 75
"And for such labor and services.....	300 00

On a motion made for a further and additional bill of particulars, and on an affidavit made by Hiram R. Hulse, the secretary of the plaintiff corporation, and upon the complaint, answer and reply herein, in support of said motion, and the affidavit of the defendant in opposition thereto, an order was made on the 9th day of December, 1892, and it was ordered:

"That the said motion be, and the same is hereby granted, and the defendant is hereby ordered and required * * * to furnish * * * a further and additional bill of particulars herein, in which bill of particulars, shall be separately stated, how much money was by the defendant paid to, or is claimed by the defendant to have been paid to, G. M. Muren, Esq., for the salary of the said Muren in each week from the 23d day of March, 1891, to and including the 19th day of September, 1891, and separately how much was by the defendant paid to, or is by him claimed to have been paid by him in each week during said period to said Muren for the disbursements of said Muren, particularly setting forth separately, each payment to said Muren for postage, express charges, advertising and incidental expenses, and specifically

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of what such incidental expenses consisted of, stating the amount of each separately, and giving the dates, respectively of each of the twenty-six payments referred to in the first paragraph of the bill of particulars heretofore served herein.

"And further in which additional bill of particulars shall be stated separately, what sums the defendant retained for postage and incidental expenses, and of what said incidental expenses consisted, stating the amounts of each separately, and the dates respectively, when the defendant retained each and all of said sums for postage and incidental expenses.

"And that on failure to furnish such further bill of particulars, he be precluded from giving upon the trial, evidence of any matters contained in paragraph third of his answer, relating to payments of expenditures of the said sum of $338.75."

From this order defendant appeals.

Defendant in his affidavit, avers, that on or about February 3, 1891, he "was appointed day officer or cashier of the plaintiff. That at a meeting of the plaintiff * * * on or about the 21st day of March, 1891, * * * it was

"*Resolved*, that the day officer be authorized to expend the sum of ten dollars per week for the necessary expenses, attendance at, and in the business of the office of the bank." That immediately thereafter, defendant, with the approval of the plaintiff, employed Mr. Muren, and that he was employed during the times mentioned in his answer, and in his bill of particulars. That he "understood said resolution to mean * * * that the said sum of ten dollars had been appropriated to be paid each week for the clerk hire and incidental expenses of the plaintiff." That defendant, therefore, agreed upon no fixed salary to be paid to the said Mr. Muren, but arranging with Mr. Muren, that whatever remained of the ten dollars after paying for postage, expressage and advertisements, and other incidental expenses of the office, should be retained by Mr. Muren as his compensation for his services; that deponent kept no account of such incidental expenses, but each week during the time that Mr. Muren was so

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employed by him, he paid Mr. Muren ten dollars, and charged the same ten dollars to office expenses. "That he is unable to give any itemized account of the incidental expenses of the plaintiff's office during that time." That Muren left plaintiff's employ on or about the 19th day of September, 1891. That from that date to the 14th day of November, 1891, this deponent received the ten-dollar weekly allowance from the plaintiff, paid the various incidental expenses of the office of the bank, and retained the balance, as he verily believes he was empowered by such resolution, and had a right to do. "That deponent kept no itemized statement of said incidental expenses. * * * That deponent is, therefore, unable to give an itemized statement of such incidental expenses during the period he was alone in the office." The complaint (paragraph 3) alleges conversion on the part of the defendant, of the said sum of three hundred and thirty-eight and seventy-five-hundredths dollars ($338.75). The answer *specifically* denies the conversion.

Defendant's inability to give the bill of particulars required by the order, at folios 10, 11 and 12, is positively sworn to by defendant in his affidavit, at pages 12 and 13, and not contradicted by the plaintiff, and plaintiff does not in any manner show that the defendant can give the information.

The law will not compel a party to do an impossible thing; to do that which he cannot do. Should the order appealed from remain in force, then by reason of his inability to comply with the order, he is precluded from giving any evidence whatever to sustain his defense, as set up in his answer, or in defense to a charge of conversion, on which he can be subjected to imprisonment. If the defendant cannot give a more particularized bill than he has already given, then it *certainly would not be in furtherance of justice* to deprive him of his defense, and refuse him a hearing, when the case is brought on for trial.

The ordering of a bill of particulars is in the discretion of the court. It must be a *sound* discretion, and in furtherance of justice, and within the application of legal principles.

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In *Butler* v. *Mann*, 9 Abb. N. C. 50, INGALLS, J., says: "The power (to direct a bill of particulars) thus conferred should be prudently employed. * * * This statute, if judicially enforced, will be of great value, otherwise, it will prove mischievous and oppressive."

In *Ammidown* v. *Century Rubber Co.*, 59 N. Y. Super. Ct. 460, the facts were almost identical with the case at bar. MCADAM, J., in his opinion, at page 469, says: "The rubber company by the affidavit of its treasurer, proves this in effect, when he swears, that 'he is utterly unable to furnish any particulars in the matter further than he has already furnished; that he has made a thorough examination of his books, but he is not able to add anything to what the bills of particulars already served contain.' If the rubber company cannot give a more particularized bill than it has already given, it is certainly not in furtherance of justice to strike out its defense and refuse it a hearing when the action is called for trial. The law never requires a party to do an impossible thing, under the penalty of being denied a hearing in defense of its right to liberty or property."

For the reasons above stated, the order appealed from should be reversed, with costs to the appellant to abide the event.

VAN WYCK and FITZSIMONS, JJ., concur.

Order reversed.

KECK *v.* SANDFORD, Prest., etc.

(City Court of New York — General Term, February, 1893.)

Proof that defendant's wagon, by which plaintiff was injured, was being driven fast, is not alone sufficient to support a finding of negligence on the part of the defendant, unless it was at a rate of speed forbidden by law.*

ACTION to recover for personal injuries alleged to have been sustained by the plaintiff, by reason of defendant's driver run-

*See Moak's Underhill Torts, 701; *Knupfle* v. *Knickerbocker, etc.*, 84 N. Y. 491; *McGrath* v. *New York, etc., R. Co.*, 63 id. 522.

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ning into the wagon of plaintiff, and was heard before the court and a jury. The jury rendered their verdict for the plaintiff on the 25th day of October, 1892, for the sum of five hundred dollars ($500). Judgment was entered thereon on the 26th day of October, 1892. An order was entered denying defendant's motion for a new trial. From said judgment and order defendant appeals.

John Fennel, for plaintiff (respondent).

Seward, Guthrie & Morawetz, for defendant (appellant).

McGown, J. After the testimony had been closed and the trial justice had charged the jury, defendant's counsel made the following request:

"Defendant's Counsel — I would like your honor to charge the jury, that the fact that the driver of the express company was driving fast, as had been testified to in this case, is not sufficient of itself to establish negligence, and to charge the defendant with the consequence of negligence.

"The Court — I decline so to charge."

The request was to charge that driving "fast as testified to on the trial" was not sufficient to establish negligence.

The only evidence on the trial as to the rate of speed defendant's driver was driving, is that of the plaintiff, who testified at folio 35 "that he (defendant's driver) was driving fast."

Ernest Deltz, a witness on the part of the plaintiff, testified at folio 44, that "The Adams Express wagon was being driven so rapidly as to attract my attention." And at folio 48, "I do not think it took me a second to get up to him; he was going at a pretty fair gait. Running, it would take me about eight seconds to get from my house, 84 to 78. At the time of the accident I was where 78 is, on the ground, on the sidewalk; the first thing I saw was this Adams Express wagon going by me at 86. I went to 78 and stood and saw the accident, and then ran after the Adams Express wagon and stopped at opposite 76. I am certain of it. Will swear to

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that." And at folio 50: "That the Adams Express wagon was not going very fast." And at folio 56: "Q. And at the time he struck, Adams Express wagon was being driven rapidly? A. Yes."

Defendant's witness, Henry Carey, at folio 77, testified that "The rate of speed at which the Adams Express wagon was going was nothing extra," and on cross-examination at folio 79, that "The express wagon was traveling, not anything slow, but at a fair gait, too."

Defendant's witness, Charles O'Rourke, the driver, testified at folio 84: "I was going up Stanton street at a pretty slow gait."

Henry Manning, a witness for defendant, testified that "the express wagon was not going fast at all, but on an ordinary trot."

There was no evidence to show that defendant's driver was driving at an unlawful rate of speed.

We think that it was error on the part of the trial justice in refusing to charge as requested, and that the request was a proper one, as it bore a material question in the case, namely, the negligence of the defendant's driver, as evidence was given on the part of plaintiff as to the rate of speed defendant's wagon was being driven, and we cannot say whether it did or did not mislead, but such refusal may have misled the jury upon that particular point, inasmuch, if they believed the testimony of the witnesses as to the rate of speed the wagon was being driven, as such might have affected the minds of the jury, and led them to bring in their verdict in favor of the plaintiff.

Even had the evidence been clear that defendant's wagon was being driven fast, that fact alone was not sufficient to support any finding of negligence on the part of the defendant, unless the wagon had been driven at an unlawful rate of speed, a rate of speed forbidden by law or ordinance, in which case there would be a presumption of negligence on the part of the driver.

In *Crocker, etc.*, v. *Knickerbocker Ice Company*, 92 N. Y.

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652, the evidence was that the driver was driving the team at "a lively trot." The court say: "It cannot be held as matter of law or fact merely driving at the rate of speed stated in the streets of a city is negligence. Persons driving in the streets of a city are not limited to any particular rate of speed; they may drive slow or fast, but they must use proper care and prudence, so as not to cause injury to other persons lawfully upon the streets. There was no proof in this case, or at least not sufficient proof for submission to the jury, that the team was driven carelessly, or that the driver was negligent."

The judgment and order herein appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN WYCK and FITZSIMONS, JJ., concur.

Judgment reversed, new trial ordered.

ZIEHEN *v.* SMITH.

(Rockland County Court — February, 1893.)

Defendant, by contract of sale, agreed that he would convey and assure to plaintiff certain premises, by good and sufficient deed, subject to a mortgage of $1,000. Upon the execution of the contract, August tenth, plaintiff paid to defendant, on the purchase price, $500. Thereafter it was ascertained that there was another mortgage upon the premises, to foreclose which action had been brought prior to the execution of the contract of sale. The premises were sold and conveyed under the judgment in the foreclosure action. In an action brought to recover the $500 paid to defendant, *held*, that plaintiff was entitled to recover without proving either that he demanded of defendant a performance of the contract on his part, or tendered performance on his part.

MOTION for a new trial. The opinion states the case.

Abram S. Demarest, for plaintiff.

Frank P. Demarest, for defendant.

WEIANT, County J. On August 10, 1892, the defendant David J. Smith, by John J. Smith, his agent, and codefend-

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ant in this action, entered into a written contract whereby he agreed to sell to the plaintiff in this action, a parcel of real property therein described for the consideration of $3,500, which was to be paid and secured as follows: $500 cash upon the execution of the contract; $300 cash on the 15th day of September, 1892; to assume a mortgage of $1,000 then upon the property, and for the balance of $1,700 the plaintiff was to give the vendor his bond and mortgage upon the said premises payable on or before one year after date.

The vendor agreed that he would "by good and sufficient deed, subject to a mortgage of $1,000, convey and assure to the plaintiff the said premises." The contract does not express in words when this conveyance was to be given, but the clear understanding appears from the entire writing to be that the payment of the $300, the giving of the $1,700 bond and mortgage on September 15, 1892, by the plaintiff, and the delivery of the deed by the vendor were to be concurrent acts. The plaintiff at the time the contract was entered into, paid the defendant David J. Smith, through his brother and agent John J. Smith, the $500 cash. Prior to the 15th day of September, 1892, the plaintiff caused a search of the title to be made and thereupon discovered that there was upon the premises, beside the $1,000 mortgage to be assumed, another mortgage to one John F. Shankey for $1,500, bearing date May 12, 1888, and recorded May 11, 1891.

The parties seem never to have had any communication with each other thereafter about the sale.

Mr. Andrew X. Fallon, an attorney and counselor, made a search of the title of this property, and on the same day called on the defendant John Smith, and asked him about the $1,500 mortgage. Smith replied that he "was to meet his attorney who would fix the matter."

He also testified that he repeated his statement to the defendant David J. Smith, who answered that he did not know anything about the $1,500 mortgage.

A suit for the foreclosure of this $1,500 mortgage appears to have been commenced and a notice of pendency thereof filed

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therein in the office of the county clerk on July 21, 1892, and wherein a judgment was granted September 30, 1892, under which the premises were subsequently sold and conveyed.

Thus the matter stood without further interview or communication between the parties until the bringing of this action.

The action was tried and disposed of as one brought by a vendee against a vendor to recover back the $500 paid, and damages for the expense which the plaintiff incurred in his preparation to carry out the contract.

The complaint was dismissed as to the defendant John J. Smith, and as to David J. Smith the case was submitted to the jury, who rendered a verdict for the $500 and interest, and twenty-five dollars for the expenses of the search of title.

During the course of the trial, by motion, and upon the submission of the cause to the jury, by request, the defendant's counsel contended for the legal proposition, that in order that the plaintiff might recover he was bound to prove that he demanded of the defendant a performance of the contract, and tendered a performance on his part.

This the court refused to do. A motion for a new trial was then made upon the minutes and exceptions taken, which raised the questions that I am now called upon to decide.

There does not seem to be accord of authorities touching this question.

In *Hudson* v. *Swift*, 20 Johns. 24, which was an action to recover back part of the consideration money paid on a contract for the purchase of land, it was held that the plaintiff must show that he has tendered the residue of the purchase money and demanded a deed so as to put the vendor in default. This was a case, also, where the covenants were dependent, and the payment of the money was an act to be concurrently done with the giving of the deed.

In *Fuller* v. *Hubbard*, 6 Cow. 13, the vendee also sought to recover back the purchase money he had paid, and it was

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there decided that where one agrees to convey on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance, citing *Hudson* v. *Swift*, 20 Johns. 24. The plea of the plaintiff therein was of a judgment that was a lien upon the lands, and the judgment in his favor in the trial court was reversed. The same principle is laid down in *Green* v. *Green*, 9 Cow. 47, and the case of *Hudson* v. *Swift*, 20 Johns. 24, approved.

In *Hartley* v. *James*, 50 N. Y. 38, Judge ALLEN, writing the opinion, says, at page 42: "The general rule is that when the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the nonperformance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party." And again, "in this state the rule is, that he must also tender performance on his part." The learned judge cites with approval the cases above, and adds: "The necessity of a formal tender or offer of performance by the one party, and a demand of performance by the other, may be obviated by the acts of the party sought to be charged, as by his express refusal to perform, or by putting himself in a position in which performance is impossible. Mere defect of title in the vendor and a present inability to give such a title as the contract calls for, may not, in all cases and under all circumstances, dispense with a tender of payment and a demand of a conveyance by the vendee, in order to entitle the latter to maintain an action for the money already paid, or to defend an action for the purchase money if the payment becomes due before a deed is to be given by the terms of the contract. Under some circumstances the court will not hold a contract void by reason of the inability of the seller to make a perfect title, but will put the purchaser to a tender of payment and a demand of the deed, to the end that the seller may make his title good."

"If a seller of lands, by an executory contract of sale before the day of performance, gives notice of his intention not to

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perform, or absolutely refuses to perform, or on being applied to is unable to perform, or offers a defective title, a formal tender and offer of payment and demand of a deed by the purchaser is not necessary to entitle him to treat the contract as rescinded, and recover back what he has paid thereon." The learned judge under each proposition cites authorities sustaining the same.

In *Bogardus* v. *New York Life Ins. Co.*, 101 N. Y. 328, Chief Judge RUGER, expressing the opinion of the court, at page 335, says: "It is only when the nonperformance is of a condition precedent, or where such party has wholly refused to perform, or has wholly disabled himself from completing a substantial performance, that the other party is relieved from performance or a tender thereof."

Thus it seems to be clear that under the general rule the party charging the default of the other and seeking redress, where the acts are concurrent, must show a tender of performance on his part and a demand of performance by the other party, in order to maintain an action such as this.

The exceptions are, failure in performance of some condition precedent, or the refusal of the party charged to perform, on his part, or the impossibility or inability on his part to perform.

In this case there was neither, on the part of the defendant, as I understand the authorities. There is no pretense of a refusal of the vendor, as nothing ever passed between the parties on the subject of performance. He had no condition precedent to perform.

There is, however, the claim of inability of the defendant to perform. It does not seem to me that the existence of this $1,500 mortgage as a lien upon the premises on the day for closing of the contract was an inability such as the rule of law cited contemplates. It evidently means one which the defendant was powerless to overcome. Judge ALLEN, in the citation from his opinion in *Hartley* v. *James*, 50 N. Y. 38, used the words, "putting himself in a position in which performance is *impossible*." Chief Judge RUGER, in *Bogardus* v. *New*

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York Life Ins. Co., 101 N. Y. 328, uses the words, "has *wholly* refused to perform" or "*wholly disabled* himself from completing a substantial performance." In *Burwell* v. *Jackson*, 9 N. Y. 535, Judge SELDEN, at page 547, uses these words, "I think it may be assumed, therefore, that the law is that where the title of a vendor who has contracted to convey is *totally destroyed*, the vendee is not bound either to offer to perform on his own part or to require performance by the vendor, but may at once treat the contract as rescinded."

It seems to me that the plaintiff in this case has not the right in law to assume the inability of the defendant to remove this incumbrance at any time, even up to and at the time of completing the sale. *Friedman* v. *Dewes*, 33 N. Y. Super. Ct. 450. He might at the very time of the plaintiff's paying the balance of the purchase money and manifesting his readiness and desire to close the sale, have been able to have the incumbrance removed. In that respect the case differs from *Burwell* v. *Jackson*, 9 N. Y. 535, for there the title of the vendor was extinguished by the sale under the mortgage before the time to complete the sale under the contract. But the counsel for the plaintiff confronts my reasons and conclusions with authorities which do not seem distinguishable from this case. He cites *Morange* v. *Morris*, 3 Keyes, 48; 32 How. Pr. 178.

That was an action to recover by a vendee similar to this, and in the head-note it is laid down as the law, that when the several acts were to be performed at the same time and the obligations of the parties in respect to them were, therefore, mutual and dependent, that ordinarily, in such case, it is incumbent on each party to perform or tender a performance on his part in order to put the other party in default. But where the defendant was unable to perform his agreement for the reason that the premises were incumbered with liens, the plaintiff was excused from tendering payment and offering to perform on his part on the day specified. The case holds that the existence of the incumbrances at the time fixed in the agreement for the execution and delivery of the deed was a

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breach of the agreement on the part of the vendor, which put it out of his power to perform, and excused the plaintiff from tendering payment.

But in that case it appears that the parties did meet and the defendant tendered a deed with the incumbrances then upon the property, and the plaintiff refused to accept. It might be that the vendee had the right to assume, upon the vendor's own acts and conduct, that he was confessedly unable to have the incumbrances removed.

That is not this case. Judge ALLEN, in *Hartley* v. *James*, 50 N. Y. 38, at page 44, distinguishes that case. So, also, in *Bigler* v. *Morgan*, 77 N. Y. 312, a case brought to recover damages, Judge RAPALLO, writing the opinion, thus speaks of the case of *Morange* v. *Morris*. He says that case "is cited as an authority for the propositions that in an action like this, the refusal or admitted inability of a party to a contract of this description to perform, dispenses not only with an actual tender of performance by the other party, but with readiness to perform. That case is not an authority for any such proposition."

In *Rinalds* v. *Hausmann*, 52 How. 190, which was, however, an action on the part of the vendor to compel the vendee to perform, Judge VAN BRUNT says: "I am aware that the language of the court in the case of *Morange* v. *Morris*, 3 Keyes, 48, sustains the defendant's position in this case. The court says that it is the duty of the seller to have the mortgages discharged before the time arrived at which he had stipulated to convey. The laying down of so broad a principle was not necessary to a decision of that case. The case of *Hinckley* v. *Smith*, 51 N. Y. 21, is a much later authority, and is in direct conflict upon this point with the case of *Morange* v. *Morris*. The case of *Hinckley* v. *Smith* lays down the rule that the seller must be in position at the time he is to convey and upon the receipt of the purchase price, to deliver just the title he has agreed to convey."

But, notwithstanding these criticisms and the distinguishings of the case *Morange* v. *Morris*, in the case of *Hewi-*

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son v. *Hoffman*, 4 N. Y. Supp. 621, we find that decision approved and followed by the General Term of the Court of Common Pleas of the city of New York. That was an action similar to this, brought by the vendee to recover back from the vendor $100 paid at the time of executing the contract. Judge DALY, writing the opinion, says: "On the day named in the agreement of the parties for the delivery of the deed, the vendor, the defendant, was unable to perform because of incumbrances upon the property which she was to convey to the plaintiff. The existence of those incumbrances at the time fixed in the agreement for the closing of the title was a breach of the agreement on defendant's part, which put it out of her power to perform, and excused the plaintiff from tendering payment, "citing *Morange* v. *Morris*, 3 Keyes, 48. The plaintiff was, therefore, not in default in not attending on the day named with the moneys or mortgage."

Thus, notwithstanding the reasons assigned and authorities cited to sustain the view I entertained upon the trial, and still hold, I am confronted with the decisions of higher courts and of judges of wider experience and legal knowledge, that appear to hold that a tender of performance on the part of the plaintiff and demand by him of performance by the defendant before suit brought, is not essential to authorize the maintenance of an action such as this. *Ingalls* v. *Hahn*, 47 Hun, 104, is cited as holding that the existence of liens on the property is sufficient proof of the seller's default. It, therefore, occurs to me that my own convictions should be surrendered to that of my superiors and more experienced judicial associates.

The merits of the case are with the plaintiff and it may be well to give him the benefit of the doubt. Had the sale under the foreclosure of the mortgage and conveyance thereunder have been made prior to the 15th day of September, 1892, there would have been such inability under the authorities as would have dispensed with the necessity of tender of performance and demand of the deed by the plaintiff, but this form of disability did not arise until after the above date.

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It may be that under the circumstances a waiver of this tender and demand may be inferred, and the verdict sustained on that ground. As remarked above, this agreement between the parties seems to carry the understanding that the conveyance was to be delivered at the same time, on September 15, 1892, as the $300 payment was to be made, and the $1,700 bond and mortgage given by the plaintiff, but the contract does not so expressly provide. The foreclosure action of this $1,500 mortgage was then pending; the time of the defendant to answer had expired, and no answer had been interposed. The parties never met for explanation, and neither at any time made any advance to carry out the agreement and complete the sale. A judgment sale and conveyance followed, and it may be that these circumstances authorized the inference that the defendant was unable, and had been at all times, to take care of, and have this incumbrance removed.

His failure to in any way communicate with the plaintiff, or to advise him as to his purpose in reference to the same, may, together with the facts that the plaintiff was present at all times in occupation of the premises, and remained there until after the conveyance under the foreclosure, warrant a finding of a waiver of tender of performance and demand of the deed, on the day named, and that the matter might be considered open and pending, and awaiting the defendant's efforts to have the incumbrance in some way removed or canceled, until it was finally rendered impossible on his part by the conveyance. And the time having thus been reached when the title passed from the defendant, the case would become one when it would fall within the exception to the general rule, of inability to perform, and thus tender and demand be excused.

The motion for a new trial is accordingly denied.

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Beyer v. Victor.

(New York Superior Court — General Term, February, 1898.)

When plaintiff, who was at work on an elevator, had got a truck containing a heavy case of goods half off the elevator, a chain running through the elevator was shaken by a fellow-servant, which action plaintiff knew was meant to obtain an answer whether the elevator was in use. He was not sure that he answered the signal as was the custom; the platform went down about two feet; the truck tipped; the case of goods fell against plaintiff; he made a loud noise, and the platform was raised so as to be level with the floor. In an action to recover for injuries received, *held*, that as it appeared that plaintiff understood the working of the elevator and in particular the liability of a premature going down of the same, and continued in the service after knowledge thereof, he assumed all risks of what he saw and understood. *Held*, further, that if the negligence of his fellow-servant in the management of the elevator caused the accident plaintiff could not recover.

Appeal by plaintiff from judgment entered upon an order dismissing complaint at trial term. The opinion states the case.

August P. Wagener, for plaintiff (appellant).

Blumenthal & Hirsch, for defendants (respondents).

Sedgwick, Ch. J. The action was for damages to plaintiff from defendants' alleged negligence in not furnishing a safe elevator. The facts were as follows: The plaintiff had been for seven years a porter, employed by the defendants in their store. Through that time, he knew, as did the other porters, of whom a witness Leib was one, the construction of the elevator and the way in which it was intended to be worked and in which it was worked. At the time of the accident, the elevator was used as it had been used always. On the day in question the plaintiff in the course of his work rolled upon the platform of the elevator a heavy case of goods, which was on a four-wheeled truck and remained there. The plaintiff set the elevator in motion by pulling a rope, and it went to the fourth floor. He moved the truck, so that it went about

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half upon the floor. Before he had gone farther, a chain that went down through the platform below, was shaken. He knew that was meant to obtain an answer whether the elevator was in use. The chain was shaken by Leib upon the floor below. On the trial the plaintiff was uncertain whether he, upon seeing the rope shake, spoke to the man, as the custom was. Perhaps, he believed, that as the truck was half off, he could get it all off at once, so as to clear the elevator for use, and that it was not necessary to speak. The platform went down about two feet. The truck tipped towards the plaintiff. In this way it was that he received the bodily injuries; when the case fell against him, he made a loud noise, and forthwith the platform was raised again, so as to be level with the floor.

From these facts it is evident that the plaintiff understood the way of working the elevator and in particular the liability of a premature going down of the platform. When, after knowledge of this, he continued in his service, he bore the risks which he saw and understood. Indeed, the immediate occasion of the accident was that he did not make known in time to Leib below, that he was using the elevator. Such had been the practice of years and the plaintiff knew the necessity of it. After he did speak loud enough, the platform was returned to a level with the fourth floor. On the other hand, if Leib's negligence in the management of the chain and of the rope that let on steam, caused the accident, it was the negligence of a fellow-servant that would forbid a recovery by the plaintiff.

The action of the judge below was called for by the evidence.

Judgment affirmed, with costs.

Dugro and Gildersleeve, JJ., concur.

Judgment affirmed, with costs.

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HALSTED *v.* MANHATTAN RAILWAY COMPANY.

(New York Superior Court—General Term, February, 1898.)

It is settled law that if a party against whom a verdict is rendered on conflicting evidence neglects to request the court to direct a verdict, his motion for a new trial on the minutes, either on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will be denied.

Where there is no conflict of evidence, the question whether it is sufficient to sustain the verdict may, without such request, be considered where a new trial on the minutes is asked for on the ground that the verdict is against law.

No matter what the evidence may be as to the facts, a jury is not required to always find for the plaintiff in cases in which elevated railroad companies are defendants.

APPEAL from judgment, entered on a verdict of a jury, and from an order denying motion for a new trial.

Roger Foster, for plaintiff (appellant).

Davies & Rapallo (*Julien T. Davies* and *R. L. Maynard*, of counsel), for defendant (respondent).

GILDERSLEEVE, J. This action was brought to recover damages for injuries to plaintiff's premises caused by the maintenance and operation of defendant's elevated railroad. It was tried before a jury, who found in favor of defendant. From the judgment entered on their verdict, and from an order denying plaintiff's motion for a new trial, the plaintiff appeals to the General Term.

The plaintiff mainly relies for a reversal upon the contention that the plaintiff was at least entitled to nominal damages, and that, therefore, the motion for a new trial should have been granted. We do not think this proposition can be sustained. The plaintiff did not, at the close of the case, request the court to direct a verdict in his favor. He seemed to regard the case as one for the jury, in view of the conflict of evidence. He took his chance of securing a favorable verdict, which would have concluded the defendant upon the

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facts. He cannot now be heard to allege that the verdict is without evidence, and, therefore, against law. The question of law, sought to be made here, should have been made on the trial. If there was no evidence to warrant the verdict, it was error to submit the questions to the jury, which, upon timely objection, would have been the subject of an exception to be reviewed here. But, by not taking the objection and exception at the trial, the plaintiff waived it, and it cannot be raised by a motion, addressed to the discretion of the court, to correct the error of the jury. *Barrett* v. *Third Avenue R. Co.*, 45 N. Y. 632.

It is the settled law of this court that the party against whom a verdict is rendered on conflicting evidence, cannot sustain a motion for a new trial on the minutes, either on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, if he neglects to request the court to direct a verdict in his favor. But where there is no conflict of evidence, the question whether it is sufficient to support the verdict may, without such request, be considered on a motion for a new trial on the minutes, made on the ground that the verdict is against law. *Keeler* v. *Barrett's Dyeing Establishment*, 54 N. Y. Super. Ct. 369. In the case at bar, there is a material conflict of evidence, and the questions of fact arising therefrom were properly submitted to the jury by the learned trial judge, and the jury, by their verdict, found in favor of defendant. We are not disposed to interfere with this conclusion.

There is no law which requires a jury, no matter what the evidence may be as to the facts, to always find for the plaintiff in cases of this character, in which the elevated railroad companies are defendants. It is the duty of the jury, under proper instructions of the court, to find as their conscience directs, in view of all the evidence. This is, presumably, what they have done in the case at bar, and there is sufficient evidence to sustain their verdict.

There are no exceptions of enough importance to warrant a reversal.

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The judgment and order appealed from must be affirmed, with costs.

Sedgwick, Ch. J., and Dugro, J. concur.
Judgment and order affirmed.

Marx v. Gross.

(New York Superior Court—General Term, February, 1893.)

At the trial, defendant obtained leave to withdraw a juror upon paying the costs and disbursements of the action up to date. These costs were paid, and the answer amended. Final judgment was obtained by plaintiff. *Held*, that plaintiff could not include in his bill of costs the costs paid as a condition of obtaining leave to amend; that the order allowing amendment was an adjudication that the costs imposed belonged to plaintiff, and that they could not be again taxed in favor of either party.

Appeal from an order dismissing plaintiff's motion for a retaxation of costs.

George A. Black, for plaintiffs (appellants).

Foster & Thomson, for defendants (respondents).

Dugro, J. During the trial the defendant obtained leave to withdraw a juror upon paying the costs and disbursements of the action up to date. He paid the costs and amended. A final judgment was obtained by the plaintiff, who presented a bill of costs from which, upon taxation, the clerk struck all items included in the costs paid, as a condition of obtaining leave to amend.

From an order made at Special Term affirming the taxation, this appeal is taken. The clerk's action was proper. The items in question were finally disposed of by the order allowing the defendant to amend, he having paid the costs and amended. The order was an adjudication that the items covered by it belonged to the plaintiff; they could not be again

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taxed in favor of either party. *Seneca Nation* v. *Hawley*, 32 Hun, 288; *Provost* v. *Farrell*, 13 id. 303.

Order affirmed, with ten dollars costs and disbursements.

SEDGWICK, Ch. J., and GILDERSLEEVE, J., concur.

Order affirmed, with costs.

HALSTEAD *v.* HALSTEAD.

(New York Superior Court — General Term, February, 1893.)

In an action for admeasurement of dower, defendant denied plaintiff's claim that she was the lawful widow of defendant's testator, one J. H., deceased. Plaintiff, in pursuance of an order, served a bill of particulars, alleging that the allegation of widowhood, in the complaint, was founded upon a nonceremonial marriage, and giving the place and date thereof, and the parties present thereat. In an application by defendants for an additional bill of particulars, *held*, that the bill previously given was sufficiently comprehensive.

APPEAL from order of Special Term, denying defendants' motion for an additional bill of particulars. The opinion states the facts.

Lewinson & Falk, for plaintiff (respondent).

Platt & Bowers (*John M. Bowers*, of counsel), for defendants (appellants).

GILDERSLEEVE, J. This is an action for admeasurement of dower. The only issue between the parties arises from the denial by defendants of plaintiff's claim that she is the lawful widow of defendants' testator, one Jacob Halstead, deceased. The plaintiff, in pursuance of an order of the court, served a bill of particulars, alleging that "the allegation of widowhood, in the complaint, is founded upon a nonceremonial marriage, contracted and consummated on or about April 4, 1889, in the apartments then occupied by the plaintiff at No. 356 West Fifty-sixth street, New York city, there being present, at the time of the making of the marriage agree-

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ment, one George Baillard and Helene D'Enghien, as witnesses." The defendants then interposed their answers, and moved for an additional bill of particulars as to the following matters: "(1) The last-known addresses of George Baillard and Helene D'Enghien, the two persons mentioned in the bill of particulars, already furnished, as having been witnesses to the alleged marriage of the plaintiff with Jacob Halstead, deceased. (2) The place or places where it is claimed the plaintiff and the said Jacob Halstead cohabited together as husband and wife. (3) A statement of the persons, and their addresses, before whom acts were performed or declarations made, which are claimed to establish such marriage, and the time and place where such acts or declarations were made. (4) A statement of any knowledge at any time made by the said Jacob Halstead, of the plaintiff as his wife, the places where made, and the names of any persons, with their addresses, in whose presence such declarations were made. (5) The time when, and the names and addresses of any person or persons before whom it is claimed that the said Jacob Halstead held out or recognized the said plaintiff as his wife. (6) The hour of the day on April 4, 1889 — the day alleged in the bill of particulars — when the alleged marriage was contracted in the apartments of the plaintiff, 356 West Fifty-sixth street."

The motion was denied, and from the order denying such motion, the defendants appeal to the General Term.

We are of opinion that the defendants' demand is much too comprehensive. The demand of the defendants almost amounts to a demand that plaintiff shall supply them with a detailed statement of the means by which she expects to substantiate her claim at the trial; and clearly such a requirement calls for a disclosure of the evidence, and transcends the office of a bill of particulars. *Roberts* v. *Cullen*, 40 N. Y. St. Repr. 672. The purpose of a bill of particulars is to limit the generality of the complaint, and prevent surprise at the trial; not to furnish evidence; and where the demand seems calculated to enable defendants to seek evidence to meet the

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claim, rather than to ascertain the items of which it is composed, it should be denied. *Gee* v. *Chase Mfg. Co.*, 12 Hun, 630; *Drake* v. *Thayer*, 5 Robt. 694.

The bill of particulars should be confined to the claim (Code, § 531), and there are no allegations in the complaint that would warrant the court in compelling the plaintiff to comply with defendants' demands. The complaint merely alleges that plaintiff is the widow of the testator, and, on defendants' demand, has already given a bill of particulars of the alleged marriage, the place, date and the names of the witnesses.

It is not the office of a bill of particulars to apprise defendants of the nature of plaintiff's proofs, the names of her witnesses. *Dempewolf* v. *Hills*, 53 N. Y. Super. Ct. 105. Nor is it given or required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same. Its entire scope and nature is to furnish information to an opponent and to the court of the specific proposition for which the party contends. *Stevens* v. *Webb*, 4 Civ. Proc. Rep. 64; *Higenbotam* v. *Green*, 25 Hun, 214. But it is not its purpose to disclose the evidence relied upon to establish any proposition. *Ball* v. *Evening Post Pub. Co.*, 38 Hun, 11.

The bill of particulars, already given, is all that is warranted by the allegations of the complaint, and it is sufficiently comprehensive to prevent defendants from being taken unduly by surprise at the trial.

The order appealed from must be affirmed, with ten dollars costs, and disbursements.

Sedgwick, Ch. J., concurs.

Order affirmed.

Milbank, Individually and as Administratrix, *v.* Jones.

(New York Superior Court — General Term, February, 1893.)

Plaintiff's intestate brought action against defendant to recover a sum of money. On the trial a verdict was rendered for defendant, but on appeal was reversed, and a new trial ordered. After the reversal, and before the new trial, plaintiff's intestate died, and plaintiff, his

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widow, was appointed his administratrix. Before his death, plaintiff had received a transfer of the cause of action as collateral security for a loan which she had made him, and after his death upon petition, an order was made on notice to defendant, reviving the action, and substituting plaintiff individually and as administratrix, instead of the original plaintiff. When the cause came on for retrial, counsel for defendant raised the objection that the cause of action in the plaintiff individually could not be united with the cause of action in her as administratrix, which objection was overruled. *Held*, proper; that the question of title was determined by the decision on the order of substitution, and could not be raised upon the trial.

THIS action was originally brought by Robert W. Milbank, the present plaintiff's assignor and intestate, to recover $5,000 and interest. The defendant's answer is a general denial. The case was first tried in November, 1888, resulting in a verdict for defendant. The plaintiff appealed to the General Term of the Superior Court, where he met with an affirmance; he then appealed to the Court of Appeals and obtained a reversal. Reported in 127 N. Y. 370. After the decision of the Court of Appeals, and on October 30, 1892, Robert W. Milbank died. The present plaintiff, his widow, was appointed his administratrix on November 10, 1892. In August, 1888, she had received a transfer of this cause of action as collateral security for a loan to her husband, which had not been paid. Upon a petition setting forth these facts (none of which were disputed), the court made an order on notice to the defendant, reviving the action and substituting the present plaintiff, individually and as administratrix, as plaintiff, in the place and stead of the original plaintiff, and that all the papers and proceedings herein be deemed amended accordingly. On the retrial, defendant moved to dismiss the complaint on the ground that, in the absence of the supplemental complaint, there was no allegation in the complaint of the death of Robert W. Milbank, or the appointment of the present plaintiff as administratrix, or of any change of ownership; also, for the reason that plaintiff could not continue the action in both her individual and representative capacities. This motion was denied. A judgment was entered upon verdict directed by

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the court, and from an order denying motion for new trial made upon the minutes, this appeal is taken.

Fetterick & Jones, for defendant (appellant).

Boeraem & Hamilton, for plaintiff (respondent).

SEDGWICK, Ch. J. The new question in the case refers to the right of the plaintiff to prosecute the action individually, and also as administratrix. The plaintiff had taken proceedings upon petition for leave to be made plaintiff as to her individual interest, and also as administratrix of the former plaintiff, then deceased. No supplemental complaint was served. On the trial, the counsel for defendant made objection that the cause of action in the plaintiff individually could not be united properly with the cause of action in her as administratrix, and also that there was no proof of her personal interest, or that she was administratrix. It will be seen that there was no issue as to these facts. No supplemental complaint had been served or required to be served. Probably, the defendant, if he wished, could have procured a direction that such a complaint be served. Indeed, the plaintiff's petition asked leave to serve a supplemental complaint. On these facts, it must be held, on the cases cited by the counsel for plaintiff, that the decision in the proceedings upon the motion is an adjudication as to the question of law and of fact then raised, and that if there were error in the decision, in the absence of a supplemental complaint, it was to be corrected by appeal. The ruling of the court below on this point should not be reversed.

The complaint alleges that the defendant, as trustee for the plaintiff, received $5,000 in trust; that, by the terms and conditions of the trust, it was provided, and said trust was upon the express condition, that the same might be terminated by the plaintiff on or after July 10, 1866, at his election.

To prove this, the plaintiff gave in evidence the following agreement, in writing: "Received of R. W. Milbank, $5,000, and also certificates for 250 shares, etc., the said money and

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stock to be returned to said Milbank in case" a certain resolution "shall not be passed and take effect before the 10th July next."

There was an objection to this, by defendant's counsel, that it did not sustain and was not the cause of action made by the complaint. The cause of action in the complaint was conditioned by the election of the former plaintiff. On the other hand, the agreement in testimony was the passing and the taking effect of a resolution before the tenth of July. It was urged that the defendant had had no notice to prepare for trial upon such an issue.

This point was considered in the opinions of the General Term and must have been by the Court of Appeals.* It must be deemed that the Court of Appeals held that it was not valid.

The other questions in the case have been determined, heretofore, unfavorably to the defendant. Exceptions as to rulings upon evidence do not need to be considered. The verdict was ordered by the court, and facts that were undisputed called for that direction, irrespective of the contests that concerned the evidence.

The judgment and order appealed from affirmed, with costs.

Dugro, J., concurs.

Judgment and order affirmed.

WEYMOUTH *v.* BROADWAY & SEVENTH AVE. R. Co.

(New York Superior Court — General Term, February, 1893.)

In the trial of an action to recover damages for injuries resulting from the alleged negligence of defendant's servants, the court refused to allow in evidence the entry in a police blotter as to statements made by plaintiff on the day of the accident to witness M. *Held*, proper; it was not admissible as proof of what the plaintiff said, for it was not the best evidence; it was not admissible to contradict M., as his attention had not been called to the statements therein, and it was not admissible to corroborate M., because it would be hearsay.

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* See 127 N. Y. 370.

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The court refused to charge defendant's request "that proof having been given that the notice required by the General Railroad Act was posted in the car in which the accident to plaintiff happened, and that plaintiff was riding upon the front platform and was upon the step of the car when injured," etc. *Held*, no error; as defendant had not pleaded the facts which would entitle it to the exemption which it claims that the act in question allows.

APPEAL by defendant from a judgment entered on a verdict in favor of plaintiff. The action was brought to recover damages for injuries resulting from alleged negligence of defendant's servants by which the plaintiff when alighting, or being about to alight, from a Broadway car, fell under the wheels and was run over. Plaintiff was conveyed to a hospital, and the police officer who had talked with plaintiff shortly after the accident made report thereof at the police station, all of which was entered on the police blotter.

Redington & Mayer, for plaintiff (respondent).

Root & Clark, for defendant (appellant).

DUGRO, J. This is an appeal from a judgment entered upon a verdict.

The trial judge did not err in refusing to allow in evidence the entry in the police blotter. It was not admissible as proof of what the plaintiff said, for it was not the best evidence; that of Mr. McLaughlin was certainly better. It was not admissible to contradict McLaughlin, as his attention had not been called to the statements therein, and it was not admissible to corroborate McLaughlin, as for this it was but hearsay.

There was no error requiring reversal in the charge or refusals to charge. That part of the charge which referred to the lack of evidence of notice was not erroneous for it did not appear that the notice was posted up or placed where it could be seen by the plaintiff. The only evidence upon the point is that "it was on both sides of the inside of the car, about the center of the car." As the evidence showed that the seats of the car were filled and persons were standing up, it became material to know with more particularity than is

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disclosed by the evidence, just where the alleged notice was, in order that the jury could say whether or not it was a notice to the plaintiff, or should be considered as such. It does not appear that with the seats filled the alleged notice was visible, and a guess is not permissible.

The refusal to charge defendant's request, "that proof having been given that the notice required by the General Railroad Act was posted in the car on which the accident to the plaintiff happened, and that plaintiff was riding upon the front platform and was upon the step of the car when injured," etc., was not error, as the defendant had not pleaded the facts which would entitle it to the exemption which it claims that the act in question allows. The evidence required the submission of the questions of negligence and contributory negligence to the jury.

Upon the whole case the judgment should be affirmed, with costs.

GILDERSLEEVE, J., concurs.

Judgment affirmed.

FLYNN *v.* CENTRAL RAILROAD COMPANY of NEW JERSEY.

(New York Superior Court — General Term, February, 1893.)

In an action for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant's servants, it appeared that at the time the injuries complained of were received and at the date of the bringing of the action, the plaintiff was a resident of Brooklyn, the defendant a foreign corporation and that the cause of action accrued in the state of New Jersey. *Held*, that this court had jurisdiction as to both subject-matter and parties.

APPEAL from a judgment entered on the verdict of a jury, and from an order denying defendant's motion for a new trial.

E. R. Terry, for plaintiff (respondent).

DeForrest & Weeks (*G. Holmes*, of counsel), for defendant (appellant).

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GILDERSLEEVE, J. This action is for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's servants.

The defendant first challenges the judgment upon the ground that this court has no jurisdiction either of the person of the defendant or the subject of the action. At the time the injuries complained of were received and at the date of the bringing of the action, the plaintiff was a resident of Brooklyn, the defendant was a foreign corporation and the cause of action accrued in the state of New Jersey.

This question was first raised by the defendant at Special Term. Judge McAdam decided it adversely to the defendant's contention, and we concur in the result that he reached, for the reasons set forth in his opinion (27 Abb. N. C. 31), from which we quote with approval:

"The defendant claims that, because the injury was inflicted in New Jersey, and the defendant is a corporation created under the laws of that state, this court has no jurisdiction, and that to obtain it against a foreign corporation, two things must concur: *First*, the plaintiff must not only be a resident of the state, but of the city of New York. *Second*, the cause of action must have arisen within the state of New York. The argument is based on the phraseology of subdivision 7 of section 263 of the Code, which, in view of other legislation, is in some respects confusing. Section 1780 provides that 'an action against a foreign corporation may be maintained by a resident of this state * * * for any cause of action.' This section is a codification of section 427 of the former Code, which provided 'that an action against a corporation created by or under the laws of any other state * * * may be brought in the Supreme Court, the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, by a resident of this state for any cause of action.' So that, prior to the new Code, jurisdiction of actions like the present, both as to parties and subject-matter, was clearly vested in this court. The jurisdiction so conferred was permanently continued by the pro-

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visions of the judiciary article of the Constitution, as amended in 1869 (art. 6, § 12), and if section 263 of the Code revision, or any subdivision thereof, in any manner limits or abridges the jurisdiction which the court possessed at the time the revision went into effect, it is to that extent unconstitutional and void. *Popfinger* v. *Yutte*, 102 N. Y. 38. The right of action is transitory (*McIvor* v. *McCabe*, 16 Abb. Pr. 319; *Home Ins. Co.* v. *Penn. R. R. Co.*, 11 Hun, 182; *Barney* v. *Burnstenbinder*, 7 Lans. 210; 64 Barb. 212), and if process is, as it was here, legally served within the county, the jurisdiction of this court, both as to subject-matter and parties, is complete. In *Brooks* v. *Mexican N. C. Co.*, 49 N. Y. Super. Ct. 234; 50 id. 281, and *Robinson* v. *Oceanic S. N. Co.*, 56 id. 108; 112 N. Y. 315, the plaintiffs were nonresidents of the state, a feature that distinguishes those cases from the one at bar, for the plaintiff here is a resident of Brooklyn in this state. In *Brooks* v. *Mexican N. C. Co.*, 49 N. Y. Super. Ct. 234, section 263 of the Code was discussed, and it was doubted whether this court could take jurisdiction against the force of its provisions. The constitutional objection to that section was neither discussed nor decided. That phase of the question is squarely presented now, and, as the objection is unanswerable, it must be met and sustained. The opinion of the Court of Appeals, in *Robinson* v. *Oceanic S. N. Co.*, 112 N. Y. 315, *supra*, read in connection with that in the case of *Popfinger* v. *Yutte*, 102 N. Y. 38, *supra*, clearly sustains the jurisdiction of the court as to both subject-matter and parties."

Upon the trial all questions in dispute were submitted to the jury, under a very fair and comprehensive charge, which, as a whole, fully protected the defendant's rights.

Many exceptions were taken by defendant's counsel to the charge and to refusals to charge, all of which we have examined and find none of sufficient merit to call for discussion here.

The jury found for the plaintiff. There was no error in the admission or exclusion of evidence; and, upon a consideration of the whole case, it cannot be held that the verdict is against the weight of evidence.

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It is a case of conflicting evidence which falls within the rule that the verdict of the jury should not be disturbed, unless there was error in the course of the trial.

The judgment and order appealed from are affirmed, with costs.

DUGRO, J., concurs.

Judgment and order affirmed.

MARX *v.* GROSS.

(New York Superior Court — General Term, February, 1893.)

Where the defendant fails to controvert by answer the allegations of the complaint, such failure is to be taken as an admission of their truth.

For the purpose of determining the basis of a cause of action for damages for the nondelivery of goods agreed by defendants to be delivered to plaintiff, the allegation of the answer of a contract of other terms or of a different character, has no function or effect.

APPEAL by defendants from judgment entered upon the report of referee.

James Thomson, for defendants (appellants).

George A. Black, for plaintiffs (respondents).

SEDGWICK, Ch. J. The action was for damages for the nondelivery of goods agreed by defendants to be delivered to plaintiff.

The learned counsel for the appellants have argued on the appeal certain questions which were not presented on the trial and did not occasion any exception to the rulings of the referee. These were the effect of the Statute of Frauds in the case and whether the principal amount if due, assuming the damages to be unliquidated, bore interest, and also as of what time the damages were to be computed.

I am of opinion that the allegation of the complaint of the contract not being controverted by the answer, was to be taken as true for the purpose of the action. Code Civ. Proc. § 522; *Fleischmann* v. *Stern*, 90 N. Y. 110. For the purpose

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of determining the basis of the cause of action, the allegation of the answer of a contract of other terms or of a different character, has no function or effect.

The differences of fact between the parties have been fully and satisfactorily considered by the learned referee. The facts found by him were supported by evidence. The conclusions of law from the facts were correct.

Judgment affirmed, with costs.

DUGRO and GILDERSLEEVE, JJ., concur.

Judgment affirmed.

CORRIGAN *v.* CONEY ISLAND JOCKEY CLUB.

(New York Superior Court—General Term, February, 1893.)

Plaintiff, engaged in the business of breeding and running horses for stakes, brought action against defendant, a domestic corporation owning and operating a race track, to recover the amount of the second money in a race called the Futurity of 1891. The complaint among other things alleged that defendant had certain privileges allowed to other similar corporations, and that it discriminated against plaintiff in respect to the allowances of races. The demand for relief was in substance that such discrimination should be stopped. On demurrer to the complaint, *held*, that although the complaint contained a statement of facts sufficient to constitute a cause of action at law for the amount of said second money, there could be no judgment in favor of plaintiff based upon it, as there was no demand for a money judgment and no answer.

Also *held*, that as defendant is a private corporation, it could choose its own customers and do or refuse to do any particular business offered it.

Also *held*, that the right of defendant to make and register bets and sell pools on the result of its races does not impose upon it the fulfillment of a public duty. The right to register bets and sell pools exists at common law and is only taken away in this state by statute. The prohibition of the statute is merely removed from racing associations during certain periods.

APPEAL from an interlocutory judgment overruling defendant's demurrer. The opinion states the case.

Platt & Bowers, for defendant (appellant).

Howe & Hummel, for plaintiff (respondent).

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DUGRO, J. This is an appeal from an interlocutory judgment overruling defendant's demurrer.

From the complaint it appears that the plaintiff at the times referred to in his pleading was engaged in the business of breeding and running horses for stakes and purses at the different race tracks throughout the United States, and has over $100,000 invested in said business; that defendant at these times was and still is a corporation organized under the laws of the state of New York, and the owner of a race track; that one of the objects for which it was formed is the improvement of the breed of horses; that to accomplish this object it conducts horse races, and that to induce owners of thoroughbred race horses to compete and to raise the standard of such horses, the defendant makes up what are known as stake and purse races, which are run at its track each year; that several other corporations do the same for the same purposes.

After setting forth the way in which stake and purse races are made up and describing the manner in which horses are entered in these races, the complaint states that in order to be a competitor in a stake race, it is necessary that entries be made before certain times fixed for each event; that the right to enter horses is granted by the defendant, as it is by every similar corporation, to every person of good repute who desires his horse to contest for either a purse or a stake; that defendant, in addition to the right granted to it by its incorporation, to have contests of speed and endurance and to continue the business of giving races, has further rights and privileges granted to it by the state; to wit: The right to make and register bets and to sell pools on the result of such races.

The complaint further sets forth a statement of facts relied upon as sufficient to constitute a cause of action at law to recover the amount of the second money in a race called the Futurity race of 1891; and continuing, states that the defendant, in order to punish the plaintiff for having applied to this court for redress against an unwarranted action of the defendant, ordered that the plaintiff be thereafter excluded from

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making any entries whatever, or racing his horses upon defendant's track.

The complaint further states that several racing corporations, including the defendant (owning and controlling the principal race tracks in the state of New York), illegally and for the purpose of oppression and coercion, and to form a monopoly to prevent opposition, confederated together under the title of the board of control; that the board is composed of the officers of each of said corporations, and is not incorporated; that the board, without right, ordered that no entries of any horse for races be received from the plaintiff by any of the corporations referred to; that each of these corporations has the same privileges and franchises granted by law as the defendant; that since said order was made, plaintiff forwarded in writing, pursuant to the rules and regulations of defendant, an entry of a horse for a sweepstake race; that defendant refused the entry. Plaintiff alleges that in order to become entitled to run horses in certain stake races, it is necessary for entries to be made prior to the closing of the several stakes, which closing the defendant has announced as about January 15, 1892, for the spring races, and August 15, 1892, for the autumn races.

The plaintiff alleges that he will sustain irreparable injury unless the relief he desires is granted. The relief he demands is contained in the last subdivision of the complaint, which reads as follows: Wherefore, plaintiff prays the judgment of this court that the said defendant be required to grant to plaintiff the same privileges as are accorded to all other reputable persons in good standing; that the defendant be ordered and adjudged to receive such entries as this plaintiff may make in races to take place on said race course; that the defendant be ordered and adjudged, so far as in its power lies, to cause the said order of the said confederation, to wit, the board of control, to be rescinded and revoked, and that the plaintiff have such other and further relief as may be just and equitable, and that plaintiff recover costs and disbursements.

The demurrer was to the complaint. It was overruled upon

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the ground that the complaint presents a legal cause of action to recover the amount of the second money in the Futurity race of 1891, and, therefore, is not demurrable.

Although the complaint may contain a statement of facts sufficient to constitute a cause of action at law for the amount of this second money, there could have been no judgment in favor of the plaintiff based upon it, as there was no demand for a money judgment and no answer. Section 1207 of the Code of Civil Procedure provides that "where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint." That demanded in the plaintiff's complaint was for equitable relief only, and to this he was not entitled.

As there could have been no judgment upon the trial in favor of the plaintiff, it follows that judgment should have been given in favor of the defendant. *Kelly* v. *Downing*, 42 N. Y. 71; *Willis* v. *Fairchild*, 51 N. Y. Super. Ct. 405; *Alexander* v. *Katte*, 10 Daly, 506; *Swart* v. *Boughton*, 35 Hun, 281. There is a dictum in *Wetmore* v. *Porter*, 92 N. Y. 76, which would lead to a contrary conclusion; but the authorities cited in support of it are not in point and do not sustain the statement, as in all of the cases cited answers had been interposed. In *Porous Plaster Co.* v. *Seabury*, 43 Hun, 611, the complaint contained a proper demand.

I think that the plaintiff is not entitled to the relief demanded, for reasons which are intended to be stated by the following:

Aside from the statement of facts which are claimed to be sufficient to constitute a cause of action at law, the gist of the plaintiff's claim is that the defendant is a corporation organized under the laws of the state of New York, having certain privileges allowed to other similar corporations, and that it discriminates against him in respect to the allowance of entries to races. His demand for relief, is in substance, that this discrimination should be stopped. As no contractual relation is claimed to exist between the parties, the right to have the relief asked, depends upon whether or not the defendant is

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under a duty to allow all persons against whom it has no reasonable ground for objection, to enter horses in its races for stakes and purses, and this question depends for its determination, upon the character of the defendant's duties to the public. It has not been claimed that any duty in the premises was imposed by a specific statutory provision, but it is rather contended that the application of general principles of law, and "a reasoning by analogy, from things that are settled, in order to establish principles to govern things that are unsettled," entitle the plaintiff to the relief sought. It has been repeatedly held that railroad, telegraph and telephone companies are *quasi*-public servants. The nature of their business makes them so, and they are, therefore, bound to serve the public on reasonable terms, with impartiality. They are almost always endowed with the right to appropriate private property, presumptively upon the theory that such corporations are *quasi*-public servants, as their business is one in which the public has a direct and positive interest.

The plaintiff claims that the defendant should be considered to be under a duty similar to that of the companies referred to. This claim will not meet with sanction here. The defendant is a private corporation. It exercises no franchises which clothe it in the premises with any public duty. It is under no duty to offer stakes or purses, and if in the transaction of its business, it has seen fit to offer these as inducements through which to further its business, it is its own way of transacting its own business for its own private ends. It does not appear that it has ever held itself out for public service, any more than is done by a bank or an insurance company. It may choose its own customers, and may do, or refuse to do, any particular business offered it.

With respect to the class of corporations of which those first mentioned form a part, it may be said, that it has long been the policy of our states to encourage the formation of private companies for the construction and maintenance of highways, railroads, canals, bridges, telegraph lines, water works or gas works, by granting valuable franchises or public bounties, or

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both, in their aid, and these grants have been of funds or property, the right to receive municipal aid, subscriptions for shares, a delegation of the power of eminent domain, and exemption from taxation or a monopoly, and in each instance, the acceptance of the grant of the public aid implies an assumption by the grantee of an obligation in favor of the the public; for instance, on the part of a railroad company, "an obligation to maintain its roads as a thoroughfare for the use of the public." In fact it may be laid down as a general rule, that whenever the aid of the government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. See Morawetz Corp. § 1114 *et seq.*

It is alleged in the complaint that the defendant has granted to it by the state the right to make and register bets and sell pools on the result of its races, and it is argued that this right imposes upon the defendant the fulfillment of a public duty, and that the acceptance of an entry of a horse to a race is one of the public duties which the defendant is obligated to fulfill within reasonable limitations. There is no grant of state aid to the defendant. The right to register bets and sell pools exists at common law and is only taken away in this state by statute. The prohibition of the statute is merely removed from those racing associations during certain periods. In allowing the defendant to sell pools there is no more a grant of state aid than there would be to a tavern keeper if certain prohibitions of the excise law were repealed or modified so as to be more favorable to the seller.

The judgment must be reversed and judgment rendered in favor of the defendant upon the demurrer, with costs.

SEDGWICK, Ch. J., concurs.

Judgment reversed, and judgment for defendant upon the demurrer.

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MILLER, as EXR., *v.* CAMPBELL.

(New York Superior Court — General Term, February, 1893.)

In 1887, B. and wife, to secure advances of money by defendant for the benefit of B., assigned to him an endowment policy of insurance on B.'s life for the benefit of his wife, issued in August, 1872, for the period of fifteen years. In 1885, B. and wife commenced an action to obtain judgment declaring the assignment void. The judgment in the action, rendered in June, 1887, directed a redelivery of the policy to B.'s wife. The husband survived the period of fifteen years. *Held*, that the interest of the wife in the policy having ceased before judgment, the same should be modified by striking out the direction that defendant deliver the policy to her.

APPEAL from judgment entered upon findings and conclusions, made by judge at Special Term.

George Van Slyck, for defendant (appellant).

Jacob F. Miller, for plaintiff (respondent).

SEDGWICK, Ch. J. The action was begun on July 16, 1885. Its purpose was to obtain judgment that certain assignments made by the plaintiff's testatrix, then the plaintiff, of policies of insurance, made for her benefit as a married woman, were void.

The case has been heard and decided by the Court of Appeals. *Brick* v. *Campbell*, 122 N. Y. 338. In my opinion, only one question remains for our decision. One policy in suit, that of the New York Life Insurance Company, made August 31, 1872, insured the life of Riley A. Brick, the husband of plaintiff's testatrix, "for the term of fifteen years, commencing on the 3d day of August, 1872, at noon." The company promised to pay the amount of the insurance "to the assured under this policy, to wit: Hannah S., wife of Riley A. Brick, for her sole use, if living, in conformity with the statute, and if not living, to the children of said person whose life is hereby insured, or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of said person whose life is

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hereby insured, in sixty days after due notice and satisfactory proof of the death, during the continuance of this policy, of the said person whose life is hereby insured as above, or if the said person whose life is hereby insured shall survive said term of fifteen years from and after the date above mentioned, from the commencement of this insurance, the sum above insured shall then be paid, etc., to him."

On the 7th of February, 1892, a supplemental answer was served, alleging that Riley A. Brick survived said period of fifteen years, and that under and by virtue of the aforesaid provision became entitled to the amount of the insurance, and the interest of the said Hannah S. Brick therein ceased and terminated, and the plaintiff had no interest in or title to the said policy of insurance.

There seems to be no doubt that at the end of the fifteen years the husband, Riley S. Brick, then living, was the only one interested in the policy or entitled to bring action upon it. And that the only interest of the wife was such as depended upon the death of the husband within the fifteen years.

The case decided by the Court of Appeals was such as existed on July 16, 1885, when the complaint was served. At that time the fifteen years had not expired. They expired on August 3, 1887. The insurance commenced on the 3d of August, 1872. Nor at the time of the trial, which was reviewed by the Court of Appeals, had the fifteen years expired. The trial was on the 16th and 17th days of June, 1887. The Court of Appeals had before it, therefore, a case of a policy in which the wife continued to have an interest and did not have before it a case in which it appeared that the fifteen years had elapsed. They passed upon the facts as they were at the beginning of the action and no supplemental answer having been made.

If the plaintiff's testatrix had no interest in the policy, the judgment should not have directed that the defendant deliver it to the plaintiff, and the judgment should be modified by striking out such direction. The provision in the judgment

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that the assignment by Mr. Brick is void, need not be disturbed.

Judgment modified as directed in the opinion, and as modified affirmed, without costs of appeal to either party.

DUGRO and GIEGERICH, JJ., concur.

Judgment accordingly.

FRY *v.* MANHATTAN TRUST CO.

(New York Superior Court—General Term, February, 1893.)

As the actual pertinency of a question will only appear upon the introduction upon the trial of some evidence which then makes it pertinent, a judge settling interrogatories cannot hold that such a contingency will not arise.

APPEAL by defendants from an order that denied defendants' motion to disallow certain direct interrogatories, proposed by plaintiff to be attached to a commission in the taking of testimony in Pennsylvania.

Bartlett, Wilson & Hayden and *Strong & Cadwallader*, for defendants (appellants).

Leopold Wallack, for plaintiff (respondent).

SEDGWICK, Ch. J. A ground taken below and on the present argument was, that under the pleadings, the plaintiff would be called upon to prove "only whether the plaintiff introduced the business described in the complaint, to the defendants as alleged in paragraph 12, and whether the defendants agreed to pay the plaintiff $59,000 for his services in introducing said business to them and in connection therewith."

If we assume that this is correct, and if we omit to consider that the plaintiff may have in his opening case to show declarations of the defendants as to relevant matters and which might be contained in the answers to the interrogatories objected to, yet all this will not include the right of the plaintiff to prepare for a rebutting case. On the trial it might turn out to be a duty, and the plaintiff could not have relief from the conse-

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quences of not being prepared with testimony. If, as it is reasonable to believe from the statements of the learned counsel for the appellant, there is a conflict of testimony and the credibility of witnesses is involved, the plaintiff is bound to prepare for that emergency and to endeavor to show that the greater weight is with the plaintiff. It is in view of these considerations and of others, that in settling interrogatories the court have used the word "pertinent." There may be combinations of circumstances, which convince one that now or hereafter, a question is not and will not be pertinent. But the general object is not merely to ask, Does the question seem pertinent in the present, but, also, how it would seem upon the trial? Such is the result of the decision in *Uline* v. *New York, etc., R. Co.*, 79 N. Y. 175. To a great degree the actual pertinency will appear only upon the introduction on the trial of some evidence which then make the pertinency. A judge settling interrogatories cannot hold that such a contingency will not arise. In the present case the question should not be overruled, because it is preposterous to suppose that anything may happen on the trial which will make answer to the question competent as evidence. On the other hand, if plaintiff's position be correct, it is not unlikely that statements in writing and verbal admissions of the defendants, in respect of plaintiff's relation to the business, may be shown in the answer honorably to the plaintiff.

It may be true that the questions call for matters that concern the private business of the witness to be examined. This would not be an objection to the questions, if they called for relevant and pertinent testimony. It may, also, be that the questions call for such a mass of written testimony that it will be a great burden to the witness to produce. This is a thing that will not be injurious to the defendants, and cannot be a ground of appeal.

Order affirmed, with ten dollars costs.

Giegerich, J., concurs.

Order affirmed.

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Riker *v.* Mahoney.

(New York Superior Court — General Term, February, 1893.)

In an action to recover for the value of services rendered by plaintiff for defendants in obtaining for them a contract to erect a house, there was a conflict of evidence both as to the nature and value of the services and of the agreement to pay plaintiff for his introduction of defendants to the owner of the house. The jury found in favor of plaintiff. *Held*, that the court on appeal would not interfere as there was sufficient evidence to justify the verdict.

Appeal from a judgment entered on the verdict of a jury, and from an order denying defendants' motion for a new trial.

Thornall, Squires & Constant (*Franklin Pierce*, of counsel), for plaintiff (respondent).

Andrew A. Henderson, for defendants (appellants).

Gildersleeve, J. The complaint herein sets forth a cause of action for the value of services rendered by the plaintiff to the defendants, in obtaining for the defendants, who are copartners in business, a contract to erect a large apartment house in West Fifty-eighth street, New York city, from one R. La Forte. The plaintiff claims that the defendants employed him to obtain said contract, and agreed to pay him the value of his services, and that the value of those services is $2,125. The defendants deny the agreement for employment and deny that the services were worth the sum stated.

The evidence establishes the facts that La Forte was first introduced to the defendant Watson, who acted for his firm in the transactions in question, by the plaintiff, after the plaintiff had informed defendant Watson of the contemplated building by La Forte; and that finally the contract for building was awarded by La Forte to the defendants. But as to any agreement to pay plaintiff for such introduction, and as to the nature and value of his services, there is a sharp conflict of evidence. The questions of fact arising from the conflicting testimony were properly submitted by the learned trial judge

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to the jury, who, by their verdict, found in favor of plaintiff's contention as to the services and agreement to pay therefor, and fixed the value of such services at $1,000. With this conclusion the General Term will not interfere, as there is sufficient evidence to justify the verdict and sustain the judgment.

The charge, when taken as a whole, is correct, and there are no exceptions to the admission or exclusion of evidence of sufficient importance to warrant a reversal.

The judgment and order appealed from are affirmed, with costs.

SEDGWICK, Ch. J., concurs.

Judgment affirmed.

MASON *v.* WHEELER.

(New York Superior Court—Equity Term, February, 1893.)

In an action in equity to rescind a contract of purchase and sale of personal property, plaintiff's prayer for relief was as follows: "First. That the contract of purchase and sale, made under the false representations and warranty as aforesaid, be rescinded and declared null and void, and defendants be compelled to accept a return of said watches sold and delivered by defendants to plaintiff, under the false representations and warranty as aforesaid, and be compelled to pay to the plaintiff therefor the sum of $10,000, besides the costs and disbursements of this action; second, that in default thereof, defendants be compelled to pay plaintiff his damages in the sum of $15,000, besides the costs and disbursements of this action." There was no tender of the goods to defendants either before or at the trial. On the contrary, it appeared that some of the goods in question had been disposed of by plaintiff. *Semble*, that plaintiff's failure to return the goods, or offer to return them, or put the court in possession thereof, was a bar to his action.

Held, that to entitle plaintiff to succeed on the ground of fraud, which was alleged in the complaint, the representations must be shown to have been made with a knowledge of their falsity, and for the purpose of deceiving him, and that they had that effect; that the burden was upon the plaintiff to establish the truth thereof by a fair preponderance of evidence.

It appeared by the complaint that at the time of giving the order for the goods in question defendants represented and warranted to plaintiff that all the goods which plaintiff might purchase of defendants, consisting

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of watches, should be full eighteen and fourteen-carat respectively, and of the same grade and quality that were sold by one Tiffany. *Held*, that this constituted a warranty as to the character and quality of the goods only, for the breach of which plaintiff had a complete remedy at law.

Plaintiff claimed that defendants had failed to furnish foreign instead of domestic watch movements, as agreed. Each of the movements was stamped with the name of an American maker, and the bulk of them were delivered before November, 1890. *Held*, that the name of the maker on the movements was immediate notice to plaintiff that they were not foreign, and that he was guilty of *laches* in waiting until February, 1891, to rescind the contract therefor.

ACTION for recission of contract. The opinion states the case.

Franklin Bien, for plaintiff.

Harriman & Fessenden, for defendants.

GILDERSLEEVE, J. In the summer of 1890, the plaintiff established himself in business as a dealer in diamonds and jewelry, at No. 246 Fifth avenue in the city of New York. The defendants were engaged in business at No. 2 Maiden lane, in said city, as jobbers in watches, and had been so engaged for many years. A business transaction was entered into by the plaintiff with the defendants, which consisted of the purchase by plaintiff from defendants of a quantity of watches, watch movements and watch cases, aggregating in value the sum of $10,229. The bulk of these goods consisted of watch cases and movements, which the defendants, being jobbers, had had made by reputable manufacturers to fill the order received from plaintiff. The defendants had solicited the patronage of the plaintiff, and the plaintiff visited their place of business by appointment, and entered into the contract in question for the purchase of the goods which the defendants were to have manufactured as aforesaid. The plaintiff was a young man, who had served his term as an apprentice in the jewelry business, but who had had little or no experience as a merchant. From samples exhibited to him by the defendants, he selected the style of watch cases that he

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desired, stated the grade or quality of the gold of which he wished them to be manufactured, and relying upon the experience and fairness of the defendants, left the price to be paid entirely in their discretion, and to a large extent, the quantity of goods. Prior to the interview at which this contract was entered into, at defendants' place of business, the defendants at plaintiff's request, purchased three chronometer watches and one calendar watch, and delivered them to the plaintiff on memoranda, to be accepted by him, or returned within a limited time. These four watches were the best of the kind there could be obtained, were purchased from the sole importers of them, and invoiced to the plaintiff at the sum of $1,760, which was a reasonable and suitable price. They were not returned by the plaintiff, but the plaintiff paid the defendants therefor the sum charged in the invoice. Subsequent to the interview that resulted in the contract aforesaid, the defendants, at plaintiff's request, purchased a quantity of nonmagnetic watches from the Non-Magnetic Watch Company of America, the sole importers of the article, at the regular list price, with the discount off, and billed and delivered them to the plaintiff at the list price adopted by the Non-Magnetic Watch Company, which was the same price the plaintiff would have had to pay if he had bought them of the Non-Magnetic Watch Company himself. The price of these goods was $2,010, and it constitutes a portion of and goes to make up the aggregate sum of $10,229, above mentioned.

From a careful consideration of all the evidence and circumstances, including the probabilities, it must be held that the transactions in respect to the chronometers, the calendar and nonmagnetic watches, were not within the contract, but separate and distinct transactions. It is satisfactorily established by the evidence that these goods were purchased by the defendants for the plaintiff, at his request, duly delivered to the plaintiff, invoiced at reasonable and suitable prices, accepted and retained by the plaintiff, and paid for by him. The transactions were complete, and the evidence discloses no ground for complaint against the defendants on the part of the plain-

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tiff. If these goods were not suited to the plaintiff's trade, and he was unable to find a market for them, the purchase of them by plaintiff was an error of judgment on his part, or a misfortune, for which no responsibility attaches to the defendants.

The plaintiff testifies that he paid the defendants $8,743. Deducting from this sum the bills for the chronometers and nonmagnetics not included in the contract in question, amounting to $3,770, we find that the plaintiff paid the defendants $4,973 on account of the goods delivered under the contract in question, leaving an unpaid balance due from plaintiff to defendants, on account of the goods delivered under the contract, of $1,486, at the time this action was brought. The plaintiff testifies that the nonmagnetics were unsalable, and that he still has all of the chronometers, but that he did sell goods purchased from the defendants to the amount of $1,162. It must, therefore, be inferred that the plaintiff sold goods received under the contract to the amount of $1,162. At the commencement of this action, the plaintiff must, therefore, have had on hand, delivered under the contract, goods to the amount of $5,297. The plaintiff has paid the defendants, as already stated, $4,973 on account of these goods, and we must, therefore, in order to ascertain the amount of money that the defendant should return to the plaintiff, deduct the $1,162 received for the goods sold, which leaves $3,811. The purpose of this action, therefore, is to compel the defendants to take back goods of the value of $5,297, and return to the plaintiff $3,811 in money. To accomplish this, the equity powers of the court are invoked to decree a rescission of the contract, and to direct the mutual acts of return and repayment to be performed. The demand is substantially that each may have his own of what remains in the possession of the respective parties.

At the opening of the trial, the learned counsel for the defendants contended, with much force and good argument, that the complaint shows a complete remedy at law in the nature of damages for breach of warranty; that the allega-

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tions of the complaint, if established, are not such as entitle the plaintiff to the interference of a court of equity; that a cause of action for a breach of warranty only is set forth; and that an inspection of the complaint fails to disclose an allegation of any special circumstance showing the inadequacy of the common-law remedy and a right to equitable relief. While this contention is not without grounds for its support, I am not inclined to accept it, but prefer to assume that the plaintiff's action has been properly brought. In *Allerton* v. *Allerton*, 50 N. Y. 670, the Court of Appeals say: "The rule that he who seeks to rescind an agreement, upon the ground of fraud, must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such a case no offer to return that which was received is necessary."

In *Gould* v. *Cayuga County National Bank*, 86 N. Y. 84, in the opinion of the court, per EARL, J., it is said: "The conclusion we thus reach leaves a defrauded party with ample remedies. One situated like the plaintiff can rescind by tendering or restoring what he has received, and then commence his action. He may keep what he has received and sue to recover damages for the fraud; or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore, in case he is not entitled to retain, what he has received. These actions are all fundamentally different. If the party is not willing or able first to restore what he has received, he is confined to one of the last two remedies."

The plaintiff had availed himself of the advantages of the market during the "holiday season" — the best portion of the year for his business — and sold, presumably at good profit, about ten per cent of the goods delivered under the contract. He was not able to restore what he had received, and thereby put the defendants in the same position that they occupied when the transaction was completed. He does not allege an offer to return the goods; but, upon the trial, the plaintiff

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was allowed to put in evidence a letter from his attorney to the defendants, written before the commencement of this action, which contained an offer to return all the watches, amounting to upwards of $10,000 in value, "which were sold upon your representations and warranty." No opportunity seems to have been afforded to defendants to inspect the goods which the plaintiff desired to return. There was an offer by the plaintiff's counsel to tender the goods to the defendants in court, when a discussion arose, and the plaintiff's counsel concluded by saying: "I withdraw the tender; I make no tender at all, now." The goods, therefore, remaining in the plaintiff's possession were not tendered at the trial, nor were they placed in the custody of the court.

It must be held that by the present action, the plaintiff has undertaken to avail himself of the latter of the last two remedies set forth in the opinion in *Gould* v. *Cayuga Bank*, above quoted. The action is in equity to rescind the contract of purchase and sale. The prayer for relief is as follows: "Wherefore, plaintiff demands judgment, first, that the contract of purchase and sale, made under the false representations and warranty as aforesaid, be rescinded and declared null and void, and defendants be compelled to accept a return of said watches sold and delivered by defendants to plaintiff, under the false representations and warranty as aforesaid, and be compelled to pay to the plaintiff, therefore, the sum of $10,000, besides the costs and disbursements of this action; second, that in default thereof, defendants be compelled to pay plaintiff his damages in the sum of $15,000, besides the costs and disbursements of this action."

It would seem, under the pleadings and proof, even from the plaintiff's standpoint, that the failure to return the goods, offer to return them or put the court in possession of them, is an obstacle to the plaintiff's success. It may be stated as a general rule that a party who seeks to rescind a contract into which he has been induced to enter by fraud, must restore to the other party whatever he has obtained by virtue of the contract. The reason for this rule is thus stated by Chief Justice

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SHAW in *Thayer* v. *Turner*, 8 Metc. 550: "The plaintiff, as far as it is in his power, shall put the defendant *in statu quo* by restoring and revesting his former property in him, without putting him to an action to recover it before he can exercise his own right to take back the property sold or bring an action for it."

There are exceptions to this rule, but the present case is not within any of these exceptions. I think the complaint, under the authority of *Gould* v. *Cayuga Bank*, 86 N. Y. 84, should have contained an offer to restore. If the present case is within any of the exceptions, it must be for the reason that the judgment asked for, will place the defendants in as good a situation as that in which they were when the agreement was made. The judgment here asked for, however, will not accomplish that. In *Allerton* v. *Allerton*, 50 N. Y. 670, it was held that where the judgment asked for will accomplish such a result, no offer to return that which was received is necessary. The case at bar does not comply with this condition.

Without resting this decision, however, upon this ground, we will continue the discussion of the case by taking up the real merits of the controversy. The action is founded upon the allegation of fraud, which is charged in the complaint as follows: "The said representations made by defendants to the plaintiff, with reference to the quality of said watches, were false and untrue at the time they were made, and were made with intent to cheat and defraud this plaintiff out of his money." To entitle the plaintiff to succeed, the representations must be shown to have been made with a knowledge that they were false and untrue, and for the purpose of deceiving the plaintiff, and that they had that effect. The burden is upon the plaintiff to establish the truth of the foregoing averment by a fair preponderance of evidence. The foundation of established facts must be satisfactorily proven by competent and reliable testimony. They must not be left in uncertainty. Fraud cannot be presumed. *Pryor* v. *Foster*, 130 N. Y. 171. The law presumes that men in their dealings with one another

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are actuated by pure motives, and seek worthy ends by honorable means. *Shultz* v. *Hoagland*, 85 N. Y. 464. If the plaintiff has failed to establish the alleged fraud, he cannot maintain the action on the theory that a liability, founded on contract, is disclosed by the evidence. *People* v. *Dennison*, 84 N. Y. 272; 80 id. 656.

At the opening of the trial, the learned counsel for the plaintiff clearly defined his position by stating: "It may be entered upon the record that the action is an action for the rescission of the contract, upon the allegations alleged in the complaint." Moreover, his able brief opens with this statement: "This is an action brought to rescind a certain contract, upon the ground of fraudulent statements and representations made by the defendants to the plaintiff to induce the plaintiff to enter into the contract, and upon which the plaintiff relied in making the same."

The representations in question were set forth in the fifth paragraph of the complaint as follows: "That thereafter the defendants represented and warranted to the plaintiff herein, that all the goods which the plaintiff might purchase of the defendants, consisting of watches, should be full eighteen and fourteen carats, respectively, and of the same grade and quality that were sold by Tiffany and other leading houses in the business, and at a reasonable price therefor, and that if the plaintiff ordered eighteen-carat watches, he should receive full eighteen-carat watches, and if he ordered fourteen-carat watches, he should receive from the defendants full fourteen-carat watches, those being the only two classes of watches that plaintiff could use in his business." These allegations of the complaint, when closely scrutinized, seem to be nothing more than a promise on the part of the defendants to do something in the future. The watch cases were to be of styles indicated by the plaintiff, and the movements and cases were to bear the plaintiff's name. The plaintiff knew the defendants were jobbers, not manufacturers, and that these goods must be ordered from other parties and manufactured before they could be delivered to the plaintiff. There seems to be an entire absence of any

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allegation of false representations as to any existing fact held out as an inducement to the plaintiff to enter into the contract. The plaintiff says he was told that the watches which he might purchase from defendants should be full eighteen and fourteen carats, respectively, and that they should be of the same grade and quality that were sold by Tiffany and other leading houses in the business, and that the price should be reasonable. This breach of the contract seems to be nothing more than a warranty as to the character and quality of the goods, even if we accept it as set forth in the complaint and as plaintiff claims it was made. At this stage of the discussion, we are impressed with the force of the claim of defendants' counsel that the complaint shows a complete remedy at law, in the nature of damages for a breach of warranty. Relying upon these representations and warranty, and believing them to be true, the plaintiff says he purchased the watches between the 1st day of August, 1890, and the 1st day of February, 1891, and that about the first day of February, he first discovered that the representations made by the defendants with reference to the quality of the watches were false and untrue, and that they were made with intent to cheat and defraud; that the watches which had been represented and warranted by defendants to the plaintiff to be of a grade of eighteen and fourteen carats, respectively, were not of such a grade, but that the watches which the defendants represented and warranted to be eighteen-carat watches, were of a grade less than seventeen carats, or thereabouts, and that the watches which defendants represented and warranted to be fourteen-carat watches, were of a grade of less than thirteen carats, or thereabouts, and that by reason thereof the plaintiff has been unable to use or sell such watches.

Of the gold watch cases in question, that were assayed, but one was found to be under seventeen carats. It may be stated as being established that the eighteen-carat cases assay something over seventeen carats, and the fourteen-carat cases assay something more than thirteen carats. The plaintiff says the contract called for *full* eighteen and fourteen carats. The other respect in which the goods were not as repre-

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sented is that they were not of the same grade and quality that were sold by Tiffany and other leading houses in the business. He makes no complaint about the prices charged. The movements were all of American manufacture of the best grade dealt in by defendants and leading houses in the business. The plaintiff claims that it appears from the evidence that Tiffany & Co. do not deal in movements of American manufacture.

At the time the contract was entered into at defendants' place of business, there were present, representing the defendants, Pearsall, the salesman, and one Brown, who had been thirteen years in the employ of the defendants. Brown took the plaintiff's order, and entered it duly in the books of the defendants, and invoiced the goods as they were delivered in accordance with the order as entered at the time the contract was made, the gold watch cases all being described respectively as eighteen and fourteen carats. The order from the plaintiff for watches, together with four chronometers, already bought for plaintiff and entered in the order book of defendants at this time, amounted to about the sum of $7,500, with specifications, sizes, designs and such details as were necessary and usual, and the defendants distributed among several reputable manufacturers orders to make up watch movements and cases, with which the order of plaintiff was filled. Among these manufacturers were Jeannot & Shiebler, Keller & Untermeyer, Robbins & Appleton, the agents of the Waltham Company, and the Courvoysier & Wilcox Company. All of the watch movements were purchased from the Waltham Company, with a few exceptions. The orders to the other concerns were mostly confined to watch cases. The defendants did not manufacture any of the goods in question, and in all instances they directed the watch cases to be fourteen and eighteen carats, respectively. All of the watch cases delivered by the defendants to the plaintiff, under the contract, were made of gold of the quality marked on each case, to wit, either eighteen or fourteen carats. The failure to assay full eighteen and fourteen carats after manufacture was due

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to the ordinary and usual process of construction. Solder is used in the construction, and when the entire watch case is melted, this solder remains in the metal, and the assay of the case, therefore, shows a lower grade than the original gold plate from which the case is manufactured. It is due to this cause that the watch cases in question assay less than eighteen and fourteen carats, respectively. It appears further from the undisputed testimony in this case that the gold manufactured into watch cases has a fixed and standard market price. A watch case made of eighteen-carat gold commands a price of eighty cents for each pennyweight of its actual avoirdupois weight. A gold watch case made of fourteen carats commands a price of sixty-four cents for each pennyweight of its actual avoirdupois weight. A gold watch case of nineteen carats commands a price of eighty-five cents for each pennyweight. In making up the price of a watch case these factors are fixed. There is no deviation among manufacturers or jobbers, and for each particular watch case, in addition to the price per pennyweight, there is a charge for making, designing and ornamenting, which varies according to the design, finish or elegance of the ornamentation. The defendants in this case in all instances paid for the goods which they had had manufactured for plaintiff, and which they sold and delivered to him at the regular standard prices for the articles. They charged the plaintiff the regular and ruling price for similar goods, and in no instance did defendants charge the plaintiff for any of the gold watch cases as much as the ruling price would have been if the case had been made according to what the plaintiff claims was his formula for making full goods. It further appears by the undisputed testimony that the watch trade in the city of New York for many years has understood by the expressions fourteen and eighteen-carat, as applied to watch cases manufactured out of gold of eighteen and fourteen-carat fineness, respectively, and it is universally known in the trade that in the manufacture of a case solder is necessarily used, and some parts are necessarily made of slightly inferior gold for purposes of

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durability, and that the case, when assayed as a whole, according to the custom of the United States assay office, will assay less than fourteen and eighteen carats, respectively, but such cases are dealt in and regarded as eighteen and fourteen carats, respectively. This knowledge extends to makers, jobbers and retailers; and many of the leading retailers, who cater to the best classes, consider such watches suitable to be sold by them as fourteen and eighteen-carat watches.

The alleged false representations, as claimed by the plaintiff, that induced him to enter into the contract, were the statements by defendants, through their salesman, Pearsall, that he, Pearsall, knew the class of watches and movements Tiffany & Co. carried. Plaintiff then disclaimed any personal knowledge of the business, but said he wanted the same class of watches that Tiffany & Co. carried, and that he wanted eighteen and fourteen-carat full; and that, relying upon the defendants' knowlege of the character of Tiffany's goods, he gave the order, and believed when he received the goods that they were of the same grade, quality and character as carried by Tiffany & Co. If it is established by the evidence that Pearsall at this time knew the grade and character of Tiffany's goods, and the defendants subsequently delivered to him, plaintiff, different and inferior goods, or if it appears from the evidence that Pearsall claimed to know the character of Tiffany's goods, when, as a matter of fact, he did not, it may be said that a false representation was made, for which the defendants were responsible, that operated as an inducement to the plaintiff to enter into the contract. Pearsall and Brown, defendants' employees, both swore positively that they were present when the plaintiff made the contract for the goods. The plaintiff, while he does not positively state that Brown was not present, says he had no conversation with Brown, but it all took place with Pearsall. An examination of all the evidence leaves no room for doubt that Brown was present and participated in the transaction. The plaintiff's testimony in support of his position is substantially as follows: "Pearsall said defendants would sell me a grade of watches exactly of the

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grade that Tiffany & Co. carried, which I particularly requested. * * * They should be the same as Tiffany & Co. carried, eighteen and fourteen-carat full. * * * Pearsall said I could rely upon him for delivering such watches. * * * I purchased from defendants in pursuance of that arrangement. In making the payments, I relied upon their statements of the goods being perfect, and according to the goods Tiffany & Co. sold." When Pearsall was asked what the plaintiff, at the time of the transaction, said about Tiffany, he stated that plaintiff "said he proposed to take a great deal of Tiffany's trade." He further testified that plaintiff said that he knew nothing whatever about watches or the watch business. Brown, for nine years in charge of defendants' watch department, testified that he was introduced by Pearsall to the plaintiff, at the defendants' store; that, anticipating the arrival of the plaintiff, from information received from Pearsall, he had caused watch cases to be laid out for plaintiff's inspection; that the plaintiff indicated the style of cases he required, and said he wanted about one-half eighteen-carat and one-half fourteen-carat, stamped with his name and address; that plaintiff did not say he wanted watches equal to Tiffany & Co., or that he wanted them *full* eighteen and fourteen-carat. Brown testified that he was present during the entire conversation between plaintiff and Pearsall at this time, and that the only mention of Tiffany was made when plaintiff showed his card for the purpose of enabling Brown to get plaintiff's address, and upon the card were the words "late with Tiffany." Brown further testified that the goods were ordered to be made for plaintiff from different manufacturers, out of eighteen and fourteen-carat gold.

Wherever the testimony of plaintiff differs from the testimony of Brown as to what occurred at the defendants' store, credit must be given Brown's statements. Brown's testimony upon the trial is corroborated by his entries in the order book made at the time, and he is also corroborated by Pearsall, and the subsequent acts of the defendants are entirely consistent with Brown's testimony.

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On this question the price charged by the defendants for the goods is a strong reason for giving credit to Brown's testimony. It is conceded that the price was left entirely to the defendants; the prices charged were reasonable and suitable, and such as rule in the trade for regular eighteen and fourteen-carat goods. Had the defendants procured the goods to be manufactured of a higher grade of gold, as they might easily have done, and produced a manufactured article that would assay eighteen and fourteen-carat full, they were at liberty to charge the plaintiff a price that would adequately compensate them for that class of goods, and so far as appears the profit to them would have been quite as large. They reaped no advantage from delivering to the plaintiff a different class of goods from what the plaintiff insists he ordered.

The testimony of Fessenden, in connection with all the facts and circumstances developed by the evidence, warrants the inference that the plaintiff had a motive in repudiating these goods.

Although it is not alleged in the complaint, plaintiff claimed upon the trial that defendants had failed in their contract in not furnishing foreign instead of domestic movements. Each of the movements was stamped with the name of some well-known American manufacturer. The goods were delivered from time to time, between May, 1890, and the middle of January, 1891, and the bulk of them were delivered before the 1st of November, 1890. The name of the maker upon the movements was immediate notice to the plaintiff that they were not foreign, and the attempt at rescission by the plaintiff on this ground, in February, 1891, after he had sold ten per cent of the goods, was not sufficiently prompt to meet the requirements of the law, and would fail for that reason alone.

Upon the whole case, I reach the conclusion that the defendants have been guilty of no false representations, and that the evidence fails to establish any fraud on the part of the defendants. The plaintiff's efforts to establish his claim against the defendants, have failed to fulfill the fundamental conditions imposed upon him by law. I can find nothing in the trans-

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actions of the defendants herein that indicates anything but fair and honorable dealings on their part. Having determined, for the reasons above set forth, that the defendants are entitled to judgment, I do not discuss the question of ratification, upon which much might be said, nor some other questions upon which the briefs of the respective counsel are very full and able.

Judgment must be entered for defendants, with costs.

LAHEY *v.* CENTRAL PARK, ETC., R. Co.

(New York Superior Court — General Term, February, 1893.)

A street railroad company has the paramount, not exclusive, right to the use of its tracks.

One who temporarily obstructs the tracks of a street railway when necessarily engaged in the prosecution of a lawful business, and is injured by the negligence of the railway company, may maintain an action for damages if he himself is without fault.

Plaintiff was engaged with other workmen in the employ of a city in laying water pipes near defendant's railway track. One of the workmen had necessarily placed the hub end of a pipe against the track when one of defendant's cars came along at the rate of six miles an hour, and the step struck the hub end of the pipe, which whirled around and struck and injured plaintiff who was standing with his back to the car. A watchman had been placed by defendant at this point to see that no obstacles were in the way, but at the time of the accident he was absent. *Held*, that the jury were warranted in concluding that plaintiff was free from contributory negligence and that the driver was guilty of negligence.

APPEAL from a judgment, entered on the verdict of a jury, and from an order denying defendant's motion for a new trial.

Harmon H. Shook, for plaintiff (respondent).

Vanderpoel, Cuming & Goodwin (*Henry Thompson*, of counsel), for defendant (appellant).

GILDERSLEEVE, J. This action was brought to recover damages for injuries to plaintiff, caused by the alleged negli-

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gence of defendant. The defendant is a corporation, and maintains and operates street railways in the city of New York. At the time plaintiff received the injuries complained of, he was engaged, with other workmen, in the employ of the city of New York, in laying water pipes in Old Slip, in said city, near the defendant's railway track. A cut had been excavated to the depth of about four feet, for the purpose of receiving a six-inch pipe, twelve feet long, and weighing about 400 pounds. Plaintiff's fellow-workmen had placed the pipe in close proximity to the cut into which it was to be put, with the hub end of the pipe against the down-town track, when one of defendant's cars came along, and the step of the car struck the hub end of the pipe and whirled it around, over and across the cut. At this time the plaintiff was standing between the cut and the pipe, at a point near the middle of the pipe, with his back to the approaching car, when the pipe, thus put in motion, struck him on his feet and caused the injuries under consideration.

It was not claimed upon the trial that plaintiff was guilty of contributory negligence. A careful examination of the record fails to disclose evidence of any negligence whatever on the part of plaintiff. The circumstances of the case, as developed by the testimony, warranted the trial court and jury in concluding, as the conduct and result of the trial indicate they must have done, that the plaintiff was free from any fault contributing to the injury. It was the duty of the plaintiff to prove by satisfactory evidence that he did not contribute to the injury by any negligence on his own part, and this requirement of the law of negligence he fairly met.

The evidence does not disclose negligence on the part of the fellow-workmen of plaintiff. It was necessary for them to have the pipe where it was, that they might place it in the cut which had been prepared for it, when it was struck by the step of defendant's car; and, so far as appears from the evidence, they did what they could to avert the accident. Any reasonable and temporary occupation by them of defendant's tracks, in the prosecution of their work, was justifiable, and

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could not be made the basis of a charge of negligence. A street railroad company has not the *exclusive* right to the use of its tracks, but simply a *paramount* right. *Fleckenstein* v. *Dry Dock, etc., R. Co.*, 105 N. Y. 655. The railroad company has the preference. *Carner* v. *New York Central R. Co.*, 44 N. Y. 465. While a person may not recklessly, carelessly or willfully obstruct the passage of the cars of a street railroad, he is not bound to keep off the tracks; and if he fairly, and in a reasonable manner, respecting the paramount right of the railroad company, temporarily obstructs the track, when necessarily engaged in the prosecution of a lawful business, and is, without fault on his part, injured by negligence chargeable to the railroad company, he may maintain an action for his damages. *Fleckenstein* v. *Dry Dock, etc., R. Co.*, 105 N. Y. 655.

The learned counsel for the appellant challenges the judgment upon three grounds, to wit: *First*, plaintiff's failure to establish any negligence on the part of the defendant; *second*, excessive damages, and, *third*, errors of the court in refusing to charge certain requests of defendant's counsel.

The charge of negligence on the part of defendant's driver was fairly supported by the testimony of unimpeached and uncontradicted witnesses, and upon this question the jury found adversely to the defendant, and we are of opinion that the evidence justifies their conclusion. The work of digging cuts and lowering pipes had been going on, at or near the point where the accident occurred, for several days. The superintendent of the defendant testifies that he had placed a watchman at this point, when the cut came near to the defendant's tracks, to look after the interests of the company, and "see that our horses got safely by the opening, and that there were no obstacles in any way." At the time of the accident this watchman was temporarily absent. The car came along and passed the cut at a rate of six miles an hour, and continued on its course without stopping. A fellow-workman of the plaintiff, apprehending danger, put up his hand to stop the approaching car. Neither the driver nor the conductor

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of the car were called as witnesses, and whether this warning was seen or not does not appear. If it was seen by the driver it is certain that he did not heed it.

The act of the driver of defendant's car in approaching and passing this point, where the conditions were such as to cause the defendant to apprehend danger and consequently place a watchman on guard, at the rapid rate of speed which the uncontradicted testimony shows he was driving, together with the other circumstances disclosed by the evidence, warranted the jury in concluding that the driver was guilty of negligence. The evidence, when taken as a whole, indicates very forcibly that it was the duty of defendant's driver to approach and pass this point slowly and cautiously, at a rate of speed which would have enabled him to stop his car almost instantly upon discovering danger. See *Schneider* v. *Second Ave. R. Co.*, 133 N. Y. 583; *McGrath* v. *New York Central, etc., R. Co.*, 63 id. 522; *Kissenger* v. *New York, etc., R. Co.*, 56 id. 538; *Ernst* v. *Hudson River R. Co.*, 39 id. 61.

We cannot agree with the learned counsel for the appellant that the facts in the case of *Schmidt* v. *Steinway & Hunter's Point Railway Co.*, 132 N. Y. 566, were stronger for the plaintiff than are the facts in the case at bar.

The Court of Appeals, three judges dissenting, granted a new trial in the *Schmidt* case, upon the ground "that the evidence failed to establish negligence on the part of the defendant." In that case the cut, railroad track, pipe and car correspond to the facts in this case, but the management of the car by the driver and the incidents in other respects are very different. In the *Schmidt* case the driver stopped the car as it approached the cut; the conductor looked along the track and concluded there was room to pass; the foreman in charge of the workmen signaled to the driver to come on, and the driver moved along at a walk, passing two sections of pipe, striking the third, and thereby causing the injury. Upon this state of facts it might well be said that the driver exercised the care required by the circumstances.

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With regard to the contention of appellant's counsel that the verdict is excessive in the amount awarded as damages, we think that a verdict of $1,000 is not unwarranted by the facts disclosed by the evidence in this case.

No exceptions were taken to the admission or exclusion of testimony. What we have already said disposes of the errors assigned by the learned counsel for appellant to the trial court in refusing to charge as requested in respect to fellow-workmen and defendant's unrestricted use of its tracks. We are of opinion that the questions in this case were clearly for the jury, and that they were fairly submitted to the jury by the learned trial court in a comprehensive charge that correctly stated the law.

For the reasons above set forth, the judgment and order appealed from must be affirmed, with costs.

DUGRO, J., concurs.

Judgment and order affirmed.

NIXON *v.* ZURICALDY.

(New York Superior Court—Trial Term, February, 1893.)

Plaintiff at an auction sale of foreign fruit, agreed with defendants to make a deduction from all purchases made by them. One E. bought some dates at the sale, and it turned out afterwards that he made his purchases for defendants. *Held*, that defendants were not entitled to any allowance on the goods sold to E.

MOTION for new trial on judge's minutes.

Olcott, Mestre & Gonzalez, for motion.

Arnoux, Ritch & Woodford, opposed.

MCADAM, J. The plaintiff received a large shipment of foreign fruit (including dates), and offered it for sale through Brown & Secomb, auctioneers. He agreed to make an allowance of one-eighth cent per pound on purchases made by defendants of not less than 4,000 boxes, and one-fourth cent per pound on purchases made by them of not less than 8,000 boxes.

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The defendants attended the sale and bought in 3,942 boxes of dates, at $8,476.11, and one Elias bought in 4,368 boxes of dates, at $9,273.33. It turned out, after the sale was over, that Elias had made his purchases for the defendants, and hence the defendants are sued for the entire amount of the purchase, $17,749.44, with interest. Elias did not disclose the defendants' name as purchasers at the sale, but gave his own name as each lot was struck off to him.

The defendants now claim to deduct from the purchase price $1,214.28, being one-fourth cent per pound on the aggregate weight, and base their right to do so upon the ground that prior to the sale they had interested Elias in their contract with the plaintiff, hence, what he did, they did. The plaintiff claims that his understanding with the defendants was personal to them, and made because they were the largest date purchasers in the United States, and the plaintiff wanted to induce them to purchase an unusually large quantity to stimulate other bidders who would be apt to follow the lead of such a well-known firm. The plaintiff claims that the defendants, knowing this, refrained from doing as they agreed, and induced Elias to purchase the bulk of the dates in his own name, that other bidders might not be influenced to bid against him as they might have been against them, and that in this way the plaintiff lost the consideration which induced him to agree to make an allowance, and the defendants obtained a large quantity of fine dates at an unusually low figure, and now seek a further gain by the one-fourth of a cent a pound allowance.

According to the defendants' interpretation of the contract, they had the right to bring Elias into it, or at their pleasure might have brought a syndicate of buyers into it, all unknown to the plaintiff, and in that way almost have run the sale to suit themselves, getting one-quarter of a cent allowance on every pound sold at whatever price the dates were struck off at. The question is whether the contract will bear that construction. It was not assignable, one test of which is the right of survivorship (5 Lawson's R. & R. § 2650), which

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would not have applied, for the privilege was one terminable at the death of the defendants. It was a proposition which should have been met, either by some binding acceptance on their part prior to the sale, or by some open evidence of acceptance at the sale, such as buying in their own names to the extent of 4,000 or 8,000 cases. The defendants did neither. The relation in which the parties stood, and the nature of the duties to be performed, with their probable effect upon others, would indicate that there were reasons why the plaintiff selected the defendants as the recipients of the allowance which would not apply to others not similarly known in that particular line of fruit. If this be so, then the contract was founded on a confidence reposed in the defendants, and created a personal trust, which could be discharged only by the personal acts of the defendants, or by the authorized and announced use of their names at the auction sale. In *Smalley* v. *Greene*, 10 Cent. Law Jour. 16, the question came up as to the right of a lawyer, employed to collect accounts, to sell his business and the power to make the collections. The court said: "It is presumed that the defendant's clients selected him for the collection of their notes because they reposed confidence in his capacity and integrity or for some reason desired him in preference to all persons else to perform this service. The defendant had no right to substitute another for the performance of duty which he had agreed to discharge himself, and he could not, without the consent of his clients, bind them to accept another to perform the service in his place." In *Robson* v. *Drummond*, 2 Barn. & Adol. 303, it appeared that one Sharpe, a coachman, contracted to furnish the defendant a carriage for the term of five years, at a given price per year, payable in advance. At the end of three years Sharpe assigned his contract to his secret partner, Robson, the partnership being unknown to the defendant. Held, that the contract was personal and not assignable. The same principle was enforced in *Lansden* v. *McCarthy*, 45 Mo. 106, the case of a butcher and hotel keeper, and applies to all cases of personal services or duties. *Spalding* v. *Rosa*, 71 N. Y. 40. It is,

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therefore, a rule in equity, that where the agreement is personal, depending upon the learning, skill or other characteristic of the contracting party, he alone can enforce performance. Waterman on Spec. Perf. § 72. The proposition of the plaintiff was not like a proposal in case of "rewards" offered to unascertained persons, for it was addressed to certain well-known and specifically-designated parties in whom, for obvious reasons, a confidence was reposed and gratuity offered for the service. If such a confidence does not require that the maxim *uberriama fides* be adhered to, it at least inhibits the concealment of facts which the party bestowing the confidence was entitled to know, and prevents the slightest unconscientious advantage by the other party, particularly such as may result from the nonobservance of strict business methods.

The leading rule of exposition is, that a contract shall be interpreted to give effect to the intention of the parties (Story Cont. § 634; 2 Pars. Cont. 494; Bishop Cont. § 575; *Parshall* v. *Eggert*, 54 N. Y. 18), and it does seem rational and manifestly just that a party should know with whom he is contracting, before or at the time of the sale, and that no stranger can be thrust upon him afterwards to his possible disadvantage, and this is evidently just what was contemplated and intended here.

Contracts which contemplate the acts of "particular" persons, are in their nature personal, and not so elastic as to enable those whose duty it is to perform them to substitute at their pleasure others to perform the trust.

The contract conferred no vested right upon the defendants; it gave them a personal privilege, nothing more; one which might have been withdrawn at any time prior to the sale. It was, therefore, in the nature of a *jus precarium*, and unassignable. As the defendants could not have transferred the entire contract, they could transfer no part of it, nor could they bring in a stranger to share its benefits. The defendants, in order to obtain the deduction, must establish a valid contract by the plaintiff to allow them on all purchases

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made by them, whether in their name or in that of Elias, one-quarter of a cent a pound or they fail in their demand for such allowance. In order to prove such a contract they must show that the parties agreed to the same thing in the same sense, for unless the minds of the parties met as to all these essentials there was no solid foundation on which the deduction can be sustained. A proposition becomes a contract only when met by an acceptance which corresponds with it adequately and entirely. This, like the former proposition, is elementary law.

For these reasons the plaintiff was of right entitled to a verdict for $17,945.64, the aggregate amount of the purchases, with interest. The verdict was properly directed, and the motion for a new trial must be denied.

Motion denied.

Finkelstein *v.* Crane.

(New York Superior Court—General Term, February, 1893.)

Plaintiff's intestate, a child between five and six years of age, was sitting on a curbstone with her feet in the gutter; on the approach of defendant's wagon, she ran towards the other side of the street, but was knocked down by the horse, and received injuries from which she died. The court stated the law on the rights of infants *sui juris* and *non sui juris*, and charged that "the child had a perfect right to be in the street there, and that the parents were not guilty of negligence in allowing it to be there." Defendants did not object to the charge or to any part of it on the same subject. The question whether the plaintiff, in case the infant was *non sui juris*, was bound to show that there was no negligence of the parents, was not called to the attention of the court.

At the close of plaintiff's case a motion to dismiss on the ground that there was no negligence on the part of defendants, and that the child was where it was unreasonable to expect a child of her age to be, was denied. *Held*, no error; that if it referred to a want of negligence of defendant's driver because he had no reason to expect that a child should be where the intestate was at the time of the accident, and that were so, plaintiff had a right to ask a verdict that the driver saw the child while she was in peril and might by proper management have prevented the accident. If it referred to negligence for which the child was responsible, it singled out a fact not of itself decisive.

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APPEAL by defendants from judgment entered upon verdict of a jury. The opinion states the case.

Adolph L. Sanger, for defendants (appellants).

Alfred Stickler, for plaintiff (respondent).

SEDGWICK, Ch. J. The action was for damages to plaintiff's intestate from the negligence of defendants' servants. The testimony would have permitted the jury to conclude that the intestate, a child between five and six years old, was on the west side of Eldridge street, sitting on the curb with her feet in the gutter; that a wagon driven by defendants' servant, with one horse and a heavy load, was approaching; that on the approach of the wagon, the child ran towards the other side of the street, but was knocked down by the horse after she had gone a short distance, and received injuries from which she died.

On this appeal it appears that there was no question as to that part of the case which relates to the negligence of defendants' driver. It is insisted that there should be a reversal, because of the charge of the court that said that the child "had a perfect right to be in the street there, and that the parents were not guilty of negligence in allowing it to be there." The defendants made no objection to this charge, or to any part of the charge on the same subject. The defendants made two requests to charge, which were acceded to, and referred only to the child as *sui juris*. The defendants made at the end of plaintiff's opening case, a motion to dismiss the complaint, on the ground under the ruling in *Hartfield* v. *Roper*, 21 Wend. 615, "also on the ground that there is no proof of any negligence."

If *Hartfield* v. *Roper*, 21 Wend. 615, held that as a matter of law, it was negligence to be imputed to an infant *non sui juris*, that he was upon a highway unattended, such a view of the case was not presented to the court below. In *Kunz* v. *City of Troy*, 104 N. Y. 344, it was said that this point was passed upon as a matter of fact. After the citation by defendants' counsel of *Hartfield* v. *Roper*, the court asked what was the

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ground of the motion. The reply was that there was no negligence on the part of the defendants, and the plaintiff's child was in a position where it was unreasonable to expect a child of her age should be. It cannot be said with certainty that the second branch did refer to a want of negligence of defendants' driver, because he had no reason to expect that a child should be where the intestate was at the time of the accident.

If this were the meaning and that were correct, it still remained the right of the plaintiff to ask a verdict that the driver did see the child, while the latter was in peril, and might, by proper management, have prevented the accident.

But if it referred to a negligence for which the intestate was responsible, it singled out one fact, that of a child between five and six years of age being in the street, unattended. Such a fact was not of itself decisive. Nothing in the case showed as matter of law for the court, affirmatively, that there had been negligence on the part of the child. It may have been that at that point of the case, if it were assumed that the child was *non sui juris*, it was a question whether the plaintiff was bound to prove affirmatively that there had been no negligence of the parents of the child. But this proposition was not presented to the court for decision.

It is argued that although there was no decision of the point, yet there were several statements in the charge not objected to, that require this court to grant a new trial. In the charge, there was a full statement of the law on the rights of infants *sui juris* and *non sui juris*. The only question that could be mooted was whether the plaintiff, in case the infant was *non sui juris*, was bound to show that there was no negligence of the parents. This was at no time called to the attention of the court. If it had been, there would have been an opportunity for the plaintiff, in the court's discretion, to give testimony on the subject.

The judgment is affirmed, with costs.

Dugro, J., concurs.

Judgment affirmed.

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Leonard *v.* Germania Fire Ins. Co.

(New York Common Pleas — Special Term, February, 1893.)

Where, from defect in the moving papers, it cannot be seen that justice will be promoted a motion for a new trial on the ground of surprise will be denied.

Where a plaintiff answers ready, and proceeds with the trial in the expectation that an absent witness will arrive in time, he takes the chance of the witness' nonattendance, and cannot urge surprise as the ground of a motion for a new trial, especially when, by the dismissal of his complaint, he may sue again.

Motion for a new trial on the ground of surprise by the absence of a witness.

Pryor, J. The method of this application is anomalous. Instead of moving on a case, the plaintiff presents an affidavit only, and that fails to communicate any information respecting the merits of the action as disclosed on the trial. No matter how absolute the surprise of a party, nor how exempt he may be from fault, still the granting a new trial depends upon the circumstances of the case and the interests of substantial justice. *Tyler* v. *Hoornbeck*, 48 Barb. 197, 199; *Williams* v. *Montgomery*, 60 N. Y. 648. How, upon the meagre matter before me, can I say that justice will be promoted by according the plaintiff another trial?

But, indeed, she exhibits no such surprise as the law recognizes to be a sufficient ground for relief. She had notified the witness, and he had been in court; but he failed to appear the day of the trial. Nevertheless, the plaintiff requested no postponement on account of his absence, but proceeded with the trial, "expecting he would be present before the plaintiff's case would be all presented to the court and jury." For lack of proof of a material fact, which the absent witness was to establish, defendant moved to dismiss the complaint; thereupon, plaintiff suggested the withdrawal of a juror, but the court refused, and dismissed the action. Thus, the plaintiff took the chance of the witness' arrival, and she must abide

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the result of her improvident experiment. So are all the cases. *Gawthrop* v. *Leary*, 9 Daly, 353, 354; *Messenger* v. *Bank*, 6 id. 190, 200. In *Cahill* v. *Hilton*, 31 Hun, 114, a motion for an adjournment was seasonably made.

In *Oakley* v. *Sears*, 30 N. Y. Super. Ct. 111, 113, the court said that a plaintiff is not remediless, because, in case of surprise, he can submit to a nonsuit. Here, as the complaint was dismissed, the plaintiff may sue again.

Except in total disregard of the established rule, and of all precedents, I cannot grant this motion.

Motion denied, but without costs.

Davis *v.* Davis.

(New York Common Pleas — Special Term, February, 1893.)

A decree of divorce in another state, proceeding only on a constructive service of process by publication, though valid by the law of the forum, is, by the law of New York, a nullity as to defendant spouse resident in New York.

A marriage with the plaintiff in such divorce suit, contracted after the divorce, annulled on the ground of the invalidity of the divorce.

The judgment of divorce, however, cannot be impeached in the action by the second spouse for fraud or error, nor because the divorce was for a cause not recognized in this state.

Action to annul a marriage. In a suit in Massachusetts by this defendant against a former wife, proceeding on a constructive service of process by publication, he obtained a decree of divorce for desertion. That decree is challenged as a nullity for want of personal service and of an appearance by the defendant therein.

Pryor, J. The plaintiff sues to annul her marriage with the defendant, because of the alleged invalidity of his judgment of divorce from another woman. The judgment is impugned for fraud, for proceeding upon a ground not recognized as a cause of divorce in this state, and for error in deciding that the plaintiff in the action was a resident of

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Massachusetts. But, that neither of these objections is available to the plaintiff in the present action, is clear on principle, and was adjudicated in *Kinnier* v. *Kinnier*, 45 N. Y. 535.

The only ground, therefore, upon which the plaintiff may invalidate the divorce between the defendant and the other woman is defect of jurisdiction in the court pronouncing the judgment to affect her status as a wife.

As the marriage purporting to be dissolved was not celebrated in Massachusetts; as the defendant in the divorce suit was not domiciled in that commonwealth, nor was served with process there, nor appeared in the action, it results that, by the law of New York, the judgment against her is of no effect; that she is still the wife of the defendant, and that, by necessary consequence, his marriage with this plaintiff is a nullity. *Mellen* v. *Mellen*, 10 Abb. N. C. 329; *O'Dea* v. *O'Dea*, 101 N. Y. 23; *Jones* v. *Jones*, 108 id. 415; *Williams* v. *Williams*, 130 id. 193; *De Meli* v. *De Meli*, 120 id. 485; *People* v. *Baker*, 76 id. 78.

To this conclusion I am compelled; but I am not forbidden to say that my reason revolts against it. By the law of Massachusetts, its court had jurisdiction of the defendant in the divorce suit, and the decree of divorce is valid and conclusive. By virtue of the supreme law of the nation, "a decree in divorce, valid and effectual by the laws of the state where obtained, is valid and effectual in all other states" (*Cheever* v. *Wilson*, 9 Wall. 109); and yet I am to declare this Massachusetts judgment a nullity. And why? Because the jurisdiction of the Massachusetts court rests solely on a constructive service of process by publication; and by the law of New York, such service is of no avail. But such constructive service of process is the only foundation of the jurisdiction of this court in the present case; yet, by the law of New York, such service gives jurisdiction to its court, and the judgment I am to render is not only valid, but of so transcendant an efficacy as to impeach the records and cancel the judicial proceedings of another state. In reason, such service of process should be sufficient in both states or in neither.

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Equally anomalous will be the effect of the judgment of this court on the relation and rights of the parties. In Massachusetts, not the former spouse, but this plaintiff is the lawful wife of the defendant; while in New York the former spouse is still the wife of the defendant, and his connection with the plaintiff a crime. Indeed, relying on the nullity of the Massachusetts decree, the former wife has instituted here an action for divorce from the defendant, on the allegation that his marriage with this plaintiff is an adulterous association. The executive of New York may demand from Massachusetts the rendition of the defendant as a bigamist; but can he be a bigamist whom Massachusetts had released from the former marriage?

The absurd and mischievous consequences of the present judgment do not relieve me from the necessity of pronouncing it; but, perhaps, the exposition of them may not be amiss in the prevalent agitation for a uniform system of marriage and divorce.

Judgment for plaintiff.

Bowden *v.* Fargo, as President, etc.

(Monroe County Court — February, 1893.)

In an action against a common carrier to recover damages for an injury to a piano shipped by plaintiff at Bridgeport, Conn., to Rochester, N. Y., it appeared that the contract was a special one by which defendant was released from its common-law liability; that at the time of shipping, a receipt therefor was received; that the piano was boxed in a secure and workmanlike manner, and that at the time of delivery at B., it was in first-class order; that from the time of its delivery to the truckman in R. until it was delivered at plaintiff's house, it was carefully handled, and when opened it was found in a broken and damaged condition. No explanation as to how the injury happened was given by defendant. A verdict was rendered in favor of plaintiff. *Held*, proper; the relation existing between plaintiff and defendant was contractual, and proof of the injury, as established by plaintiff, was at least *prima facie* evidence of negligence on the part of defendant, and its failure to explain it was sufficient to make it liable.

Appeal from a judgment in favor of plaintiff. The opinion states the case.

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A. H. Harris, for defendant (appellant).

E. L. Adams, for plaintiff (respondent).

KINNEY, County J. This is an action to recover damages for an injury to a piano shipped by respondent, at Bridgeport, Conn., to Rochester, N. Y., over appellant's line, and when unboxed at Rochester was found in a broken condition. Judgment was rendered in the Municipal Court of the city of Rochester against appellant for the sum of $369.70, damages and costs, and the case comes before this court on appeal. The contract between the parties was special, and in consideration of a reduced rate, the carrier was released from its common-law liability. The evidence shows that the piano was shipped by appellant's line; that a receipt therefor was received; that the same was boxed in a strong box, securely fastened to the box with screws and cleats in a workmanlike manner, proper for shipment by freight to the place of destination, and that when the piano was delivered to the carrier for shipment it was in first-class order in every way. It also appeared that from the time it was delivered to the truckman at the depot in Rochester until it was delivered at respondent's house, nothing happened to it, and it was handled carefully; that upon opening the box it was found that the piano was in a broken and damaged condition which rendered it practically of no value. It is, therefore, quite apparent from the evidence that the damage and injury to the article happened while the same was in appellant's possession, in the course of conveying the same between Bridgeport and Rochester. It is contended by appellant that it must be shown affirmatively by respondent that appellant was negligent, and that its negligence caused the damage, and that the inference of negligence cannot arise. The above is not the rule applicable to this case under the facts herein stated. The burden of proof in cases of this character unquestionably rests upon the plaintiff, but he is not always required to point out the precise act or omission in which the negligence consists. When the accident is one which in the ordinary course of events would not have

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happened, but for the want of proper care on the part of the defendant, it is incumbent upon it to show that it had taken such precautions as prudence would dictate, and its failure to furnish the proof where, if it existed, it would be within its power, may subject it to the inference that such precautions were omitted. *Russell Manfg. Co.* v. *New Haven Steamboat Co.*, 50 N. Y. 127.

There was a contractual relation existing between the parties, and proof of the injury as established by the evidence is at least *prima facie* evidence of negligence on the part of the appellant, and unless explained by it is sufficient to make it liable. It is not necessary that the precise nature of negligence be shown. *Koenigsheim* v. *Hamburg, etc., Co.*, 17 Wkly. Dig. 405. No explanation as to how the injury happened was given by appellant. It is quite apparent from the memoranda of the judge of the Municipal Court before whom the action was tried, that the evidence received under appellant's objections did not enter into or influence his judgment, and it will, therefore, be unnecessary to consider the same.

The judgment appealed from should, therefore, be affirmed.

CURRAN *v.* GALEN, as President, etc., et al.

(Supreme Court — Special Term, Monroe County, February, 1893.)

In an action for conspiracy it appeared that the defendants represented certain labor organizations in the city of R., and that plaintiff was in the employ of a brewing company which was a member of the Ale Brewers' Association of that city. There was an agreement between the latter and the local assembly, of which defendant G. was president, that no brewery belonging to the association was to employ any person not a member of defendants' organization nor to retain in its employ any person who declined to join same. Plaintiff was not a member of the local assembly, and upon being solicited to join the same, declined. Defendants thereupon notified his employers of the fact and he was discharged from its employ. These facts were set forth at length in defendants' answer, coupled with the allegation that their acts were without any intent or purpose to injure plaintiff. Plaintiff demurred to that part of the answer. *Held*, that the means employed by defend-

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ants to accomplish the objects of their organization not only contravened one of the fundamental principles of our free institutions, but it likewise violated the spirit if not the letter of section 171a of the Penal Code; that the said facts set forth in the answer by way of defense to plaintiff's cause of action, constituted an unlawful act and are demurrable.

DEMURRER to the second count of defendants' answer.

A. G. Warren, for plaintiff.

D. C. Feeley, for defendants.

ADAMS, J. The complaint in this action charges the defendants with conspiring to injure plaintiff in his business and character and to prevent his obtaining employment.

The defendants represent certain labor organizations in the city of Rochester. The plaintiff was in the employ of the Miller Brewing Company of the same city, and this company was a member of the Ale Brewers' Association. An agreement was entered into between the latter association and the local assembly, of which the defendant Galen was president, by the terms of which no brewery belonging to the association was to employ any person not a member of defendants' organization, nor to retain in its employ for a longer period than four weeks any person who declined to join such organization.

The plaintiff was not a member of the local assembly, and upon being solicited to join the same, declined so to do. The defendants thereupon notified the Miller Brewing Company of this fact and plaintiff was at once discharged from its employ. These facts constitute the conspiracy charged in the complaint, and they are likewise set forth at length in that portion of the answer demurred to, coupled with the allegation that defendants' acts were without any intent or purpose to injure the plaintiff. The sole question presented, therefore, is whether the defendants in what they did were acting lawfully. If they were, of course no charge of conspiracy will lie against them.

It appears that the defendant, "The Brewery Workingmen's Local Assembly 1796, Knights of Labor," is one of the

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various labor organizations of the country. Its members are workingmen who have associated themselves together, ostensibly for co-operation and self-protection. In doing this they have violated no law, and so long as they have no unlawful object in view, the legality of their organization cannot be questioned. For instance, the members of this local assembly may attempt, by co-operation, to increase their wages, and, to that end, may agree that they will work only for a certain price or upon certain conditions, provided those conditions are lawful. *Carew* v. *Rutherford*, 106 Mass. 1, 14. But it has been held that co-operative effort, while lawful within certain limits, ceases to be so when coercion is employed to control the freedom of the individual in disposing of his labor or capital (*Snow* v. *Wheeler*, 113 Mass. 179), and it seems to me that this is just where the defendants herein have overstepped the boundary line. Not satisfied with becoming members themselves of Local Assembly 1796, they have insisted that as a condition of retaining his position in the employ of the Miller Brewing Company, the plaintiff shall also join their organization, and upon his refusing to comply with their demand he has, by their direction, been deprived of his position and of the opportunity which it afforded him to earn a living. This looks very much like unlawful coercion or, what amounts to the same thing, conspiracy.

The defendants had a perfect right, as we have seen, to unite with this or any other labor organization, but they had no right to insist that others should do so, and when they make plaintiff's refusal to join it a pretext for depriving him of his right to labor, they interfere with his personal liberty in a manner and to an extent the law will not countenance, and their action instead of affording a protection to, operates as a restraint upon honest labor.

There is a statute in force in this state which makes it a misdemeanor for an employer to require as a condition of a person's entering or remaining in his employ, that he shall *not* become a member of any labor organization. Penal Code, § 171a.

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The object of this enactment was, doubtless, to prevent what the legislature regarded as an improper interference by employers with the rights of their employees, and if it is made illegal for the former to coerce the latter, it is difficult to see why it should not be equally unlawful for one employee to attempt to influence another's action by the same means.

In passing upon a question somewhat similar to the one under consideration, which arose in the state of Massachusetts, SHAW, Ch. J., declares that "the legality of such an organization will depend upon the means to be used for the accomplishment of its objects and whether they be innocent or otherwise." *Commonwealth* v. *Hunt*, 4 Metc. 111–134.

It has been shown, I think, that one of the means employed by the defendants to accomplish the objects of their organization, and the one complained of, not only contravenes one of the fundamental principles of our free institutions, but it likewise violates the spirit if not the letter of a statute of this state. It follows, therefore, that the facts set forth in the second count of the answer herein by way of defense to plaintiff's cause of action, constitute an unlawful act, and the demurrer must consequently be sustained.

Demurrer sustained.

SHEPARD *v.* SHEPARD.

(Supreme Court — Special Term, New York County, February, 1893.)

One S. conveyed to M. certain premises upon trust to receive the issues, rents and profits thereof, and apply the same to the use of said S. during the joint lives of the said S. and one P., whom he was about to marry, and, after the death of said S., to apply the same to the use of the said P. during the time of her natural life, provided, nevertheless, that should the said P. marry after the death of said S., the said trust thereby created was to cease and determine in like manner as if she were actually dead, and after her death, the fee in said premises, as well as the uses and profits thereof, were to revert to and vest in the heirs at law of said S., at which time the trust created was to cease and determine. There was a recital in the deed that said P., upon condition of the performance and execution of the said trust, released all her dower and right of dower in and to said premises. No power of sale was

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given to the trustee, and the deed was signed by S. and P. On the death of said S. and P., an action was brought by an heir at law of said S. for a partition of said property. *Held*, that under the trust deed the children of said S., living at the time of his marriage to P., took a contingent remainder in the property described, subject to be defeated in the case of death before their father, and that upon the death of S., the remainder became a vested one and alienable.

S. left a will, by which, after disposing specifically of various property, not including the premises in question, he gave all the rest and residue of his real and personal property to his widow and a daughter. *Held*, that no portion of the premises in question passed thereunder as a part of his residuary estate.

ACTION for partition of real property.

J. F. Parkhurst, for plaintiff.

W. G. Lane, for defendants.

LAWRENCE, J. On the 9th day of October, 1852, John Shepard, who is the common source of title to the premises in question, being about to marry Frances M. Parmalee, conveyed said premises to Thomas McFarlin, "upon the trust," nevertheless, "and to and for the uses, interests and purposes hereinafter limited, described and declared. That is to say, upon trust to receive the issues, rents and profits of said premises, and apply the same to the use of said John Shepard, party of the first part, during the joint lives of the said John Shepard and Frances M. Parmalee, and after the death of said John Shepard, to apply the same to the use of the said Frances M. Parmalee during the time of her natural life, provided, nevertheless, that should the said Frances M. Parmalee marry after the death of said John Shepard, the said trust hereby created is to cease and determine in like manner as if she were actually dead, and after her death, the fee in said described premises, as well as the uses and profits thereof, all and singular, to revert to and vest in the heirs at law of said John Shepard, and the trust and trusts hereby created to cease and determine."

Then follows a recital in the deed that Frances M. Parmalee desires and intends to become the lawful wife of John Shepard, and upon the condition of the performance and execution

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of the said trust, releases all dower and right of dower which she might acquire as the wife of John Shepard.

Then follows a covenant between the parties, that the premises are to be made and kept free from all incumbrance, and if any mortgage remains still unpaid at the death of John Shepard, the same shall be paid out of other property of the said John Shepard, or the amount thereof paid to Frances M. Parmalee.

No power of sale was given the trustee. The deed was signed by John Shepard and Frances M. Parmalee.

At the time of the execution of the deed, John Shepard had four children, William S. Shepard, the plaintiff, James G. Shepard, George W. Shepard and Lorena Allen, all of whom were living at the time of his death, and were his only heirs at law, he having had no other children.

John Shepard died May 1, 1867; Frances M. Shepard died September 25, 1890; James G. Shepard died intestate June 1, 1889, leaving as his only heirs at law six children, Ella V. Roe, Amelia A. Hallett, Cecila Trenchard, James Shepard, John Shepard and Malinette F. Seaman, and a widow, the defendant, Ellen M. Shepard.

In 1890, Ella V. Roe conveyed her interest in the premises to the defendant, Donald McLean, and each of the other five children of James G. Shepard about the same time conveyed their respective interests in said premises to their mother, the defendant, Ellen M. Shepard.

The defendants, Ellen M. Shepard and Donald McLean, claim to be owners of five-twenty-fourths and one-twenty-fourth respectively of said premises, as the share of James G. Shepard in the remainder vested in him by the deed of John Shepard to McFarlin.

After the death of John Shepard, and before the death of his widow, the said Frances M. Shepard, the defendant, George W. Shepard, conveyed his fourth interest in said premises to plaintiff, and Lorena Allen having conveyed her fourth interest in the same to Frank H. Allen, the said Frank H. Allen conveyed the same to plaintiff.

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John Shepard left a will, by which, after disposing specifically of various property, not including the premises described in the complaint, he gave all the rest and residue of his real and personal property to his widow, Frances M. Shepard, and his daughter, Lorena Allen, equally.

Frances M. Shepard, the widow, died, as before stated, on September 25, 1890, not having remarried, and leaving her last will and testament, in which she named the defendants, Frances A. Koos and her husband, Gustave A. Koos, as executors thereof, and devised all her real estate to them, or the survivor of them, subject to the payment of certain annuities during the lives of the annuitants, which will was duly probated and letters issued to the defendant Gustave A. Koos, the defendant Frances A. Koos not having qualified. Therefore, the defendants Koos, as trustees under the will of Frances M. Shepard, and the defendant Gustave A. Koos, as the executor thereof, claim an undivided one-half interest in the premises as tenants in common with the heirs of Lorena Allen, by virtue of the will of John Shepard, deceased.

The plaintiff contends that he is entitled to three undivided fourths of the premises, having acquired the fourth interest of his brother, George W. Shepard, and of his sister, Lorena Allen, and being entitled to a fourth interest as one of the heirs at law of his father. The defendants, Ellen M. Shepard and Donald McLean, who are the grantees of the heirs of James G. Shepard, who died intestate, claim to be the owners of the remaining fourth part of the premises, the said Ellen claiming five-twenty-fourths and the said McLean one-twenty-fourth thereof, by virtue of the conveyances to them by some of the heirs of James G. Shepard.

I am of the opinion, on this state of facts, that, under the trust deed executed by John Shepard to McFarlin, each of his four children took a contingent remainder in the property described in that deed, subject to be defeated in the case of death before their father, and that upon the death of John Shepard the remainder became a vested remainder. See *Moore* v. *Littell*, 41 N. Y. 66; *Dodge* v. *Stevens*, 105 id. 585;

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Hennessy v. *Patterson*, 85 id. 92; *Kelso* v. *Lorillard*, Id. 177–184; *Surdam* v. *Cornell*, 116 id. 305; *Ham* v. *Van Orden*, 84 id. 257.)

The interest vested in the children of John Shepard by the trust deed was alienable under the cases above cited, as it follows, therefore, that the conveyances to George W. Shepard of his undivided one-fourth, and the deed from Frank H. Allen to the plaintiff of the other undivided one-fourth conveyed to him by Lorena Allen, added to the plaintiff's own interest, made him the owner in fee simple of three-fourths of the premises mentioned in the complaint.

It also follows that the defendants, Ellen M. Shepard and Donald McLean, together own the one-fourth interest which James G. Shepard took under the trust deed, five-sixths thereof being vested in Ellen M. Shepard and one-sixth in the said McLean. It also follows that no portion of the premises in question passed under the will of John Shepard as a part of his residuary estate to his widow and his daughter, Lorena Allen. The widow was entitled, under the trust deed, to the rents and profits during her life, and Lorena Allen succeeded as one of the heirs at law to one-fourth interest in fee, which interest, as we have seen, has become vested in the plaintiff.

The plaintiff is entitled to the usual judgment in partition, with costs.

The defendants, Ellen M. Shepard and Donald McLean, are also entitled to their costs. These costs should be paid out of the estate.

As the defendant, Frank H. Allen, was brought into the controversy by reason of the attack made upon the deed to him from Lorena Allen by the defendant, Walter S. Allen, and as no proof was given to maintain that attack, I am of the opinion that he is entitled to costs against the defendant, Walter S. Allen, personally.

I think, too, that the costs of the defendants Koos should be paid out of the estate.

Judgment accordingly.

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Rutgers Female College *v.* Tallman.

(Supreme Court — Special Term, New York County, February, 1893.)

While a trustee of a corporation cannot deal with the property thereof, or make a profit out of such dealings, without incurring the condemnation of a court of equity, and being called upon to account therefor, it is not a part of his duty as such to advance his personal money to relieve it from financial embarrassment.

Application by defendant for dismissal of complaint. The opinion states the case.

Amos G. Hull, Albert Stickney and *William L. Snyder*, for plaintiff.

James M. Smith, for defendant.

Lawrence, J. No proof was offered upon the trial to support the allegations in the complaint of a conspiracy on the part of the defendant with Henry M. Pierce, to cause mortgages to be placed upon the property involved in this controversy. The only mortgage attacked is that which was executed to James F. Pierce, all the others being conceded to be valid. The Pierce mortgage was executed June 29, 1868. The foreclosure sale under the Morrow mortgage, which is conceded to have been valid, took place on the 3d of June, 1870.

The defendant did not become a trustee of the plaintiff until June 20, 1871. At that time the title to the property, by the judgment of this court, in an action to which the plaintiff was a party, was in James F. Pierce, and the plaintiff held possession of the property by permission under a lease from him. There was no agreement by Pierce, when the defendant purchased, to sell the property to the college, and the evidence fails to establish that defendant agreed to purchase it for the college. Efforts were being made to raise a sufficient sum to purchase the property from Pierce, but the loan which the savings bank had offered to make fell far short of the amount required.

Pierce had offered to rent the property to the college at a

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rent of $1,000 per month, for the year, and to sell the same at the price of $130,000, or to rent at $500 per month, "subject to vacate on thirty days' notice."

It was finally resolved by the plaintiff to take the property at a rental of $800 per month, payable in advance, provided $1,750 be paid September 1, 1871, on account, "in advance." (See resolutions of August 16 and 28, 1871.)

There is nothing in the case to show that the defendant knew anything of the alleged fraudulent character of the $52,000 mortgage to James F. Pierce, the validity of which had been affirmed by this court in foreclosure proceedings, to which the plaintiff was a party, prior to defendant's becoming a trustee. There is nothing in the evidence showing that the defendant had any knowledge that there was any irregularity, impropriety or informality connected with that mortgage. The purchase of the property by the defendant under such circumstances did not inure to the benefit of the college. The college was unable to purchase it from the person who had become, under the foreclosure judgment, its lawful owner. No agreement was proven, or offered to be proven, that James F. Pierce would have accepted $70,000 in cash, the amount agreed to be loaned by the savings bank, and a mortgage for $60,000, the balance of the $130,000 for which, the minutes of the plaintiff state, he had agreed to sell. That mortgage must necessarily have been second to the mortgage to secure the $70,000 loan agreed to have been made by the savings bank.

The defendant contracted to purchase the property from James F. Pierce on the 8th of May, 1872, and he took his deed on the 1st of June, 1872, when the hiring from Pierce to plaintiff had expired. After that, for a series of years the defendant was recognized repeatedly by the plaintiff's trustees as the owner of the property. The premises were leased from him at a rental which was at times irregularly paid. Payments then ceased, and the plaintiff was dispossessed. The recognition of the defendant as the owner and landlord of the property was complete, and unless it is to be held that a director or a

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trustee is bound by his position to advance all moneys which an insolvent or embarrassed corporation can require to extricate it from its embarrassments, and secure to it all the property which it may at any time have owned, this action cannot be maintained.

While fully appreciating the fact that a trustee cannot deal with corporate property, or make a profit out of such dealings, without incurring the condemnation of a court of equity and being called upon to account, it is not a part of his duty to put his hand in his pocket and advance money to repurchase property that the corporation once owned, and to which its title has been cut off by the judgment of a court of competent jurisdiction. I fail to discover that all the facts in relation to the defendant's connection with the property in question, which have been developed upon the trial of this action, were not known to, or could not have been known for many years, by the trustees of the plaintiff. The deed to the defendant was matter of record. He was for years recognized, as above stated, as the owner of the premises, and as the landlord of the plaintiff. It is not shown that the plaintiff is able to reimburse him for the expenses which he has incurred.

In view of the lapse of time which has occurred since the transaction which it is sought by this action to set aside and nullify, and of the evidence as to acquiescence and ratification by the plaintiff, I am of the opinion that the case must fail, when tested by the principles enunciated in recent cases in the court of last resort. *Barr* v. *New York, etc., R. Co.*, 125 N. Y. 263–275; *Gamble* v. *Queens Co. Water Co.*, 123 id. 91.

Judgment dismissing the complaint, on the merits. with costs, will, therefore, be rendered.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

NEW YORK SUPERIOR COURT — GENERAL TERM, DECEMBER, 1892.

VROOM *v.* WISE.

APPEAL from order of Special Term denying defendants' motion to have a judgment satisfied of record.

Horwitz & Hirshfield (*Otto Horwitz*, of counsel), for defendants (appellants).

Henry A. Root (*Thaddeus D. Kenneson*, of counsel), for plaintiffs (respondents).

GILDERSLEEVE, J. This is an appeal from an order made at Special Term, denying a motion made by Charles Wise, the defendant, to have a judgment that had been entered herein for costs, marked satisfied in full of record, upon the ground that it had been fully paid in settlement of another matter.

The only question involved on the motion below, and that is now presented for consideration on this appeal, is one of fact. We have carefully examined the record, and cannot find such a preponderance of evidence in support of the defendants' contention as to warrant us in disturbing the order made by the learned judge below.

The order appealed from must be affirmed, with ten dollars costs and disbursements.

FREEDMAN and MCADAM, JJ., concur.

Order affirmed.

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BROWN *v.* HELMUTH.

APPEAL from judgment of trial term, entered on verdict of jury, and from order denying motion for new trial.

James J. Thomson for plaintiffs (respondents).

L. Laflin Kellogg for defendant (appellant).

GILDERSLEEVE, J. Plaintiffs obtained a purchaser for the defendant's house. The purchase price was agreed upon between the purchaser and defendant; and at defendant's request, the plaintiffs prepared the contract of sale, which was duly executed by the purchaser and defendant; whereupon the defendant was paid and received $2,000 on account of the purchase money. These facts are established by competent and sufficient evidence, and they clearly entitle the plaintiffs to their legal commission, to wit, one per cent of the purchase price. When the contract was signed the plaintiffs' commission was earned, and it was due to the plaintiffs from the defendant, unless some culpable acts of plaintiffs can be shown to defeat their claim. There is no evidence that warrants the imputation to plaintiffs of fraud or deceit in bringing about the execution of the contract. The plaintiffs' claim is not barred upon that ground.

The defendant, however, does assert that the failure to complete the sale of the premises was due to the negligent and careless manner in which the contract was drawn by the plaintiffs. The acts of negligence charged, consist of the omissions from the contract of the restrictions contained in the deed to the premises. These omissions, the defendant alleges in her answer, were the reasons given by the purchaser for rejecting the title and refusing to complete the purchase.

The alleged acts of negligence are made the basis of a counterclaim. One of the errors assigned by the learned counsel for the defendant is that the trial judge improperly dismissed the counterclaim. This contention is not tenable, for the reason that there is no evidence whatever to support the counterclaim. Had it been submitted to the jury, and had the jury,

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upon the evidence, as it stands on the record, found in favor of the defendant, on the counterclaim, it would have been the duty of the court to set aside the verdict for the want of evidence to support it.

We find no exceptions to the admission or exclusion of evidence that calls for a reversal, and we think the charge of the learned trial judge, when taken as a whole, left such issues as there were in the case properly to the jury.

The judgment and order appealed from must be affirmed with costs.

FREEDMAN and MCADAM, JJ., concur.

Judgment and order affirmed.

CAMP *v.* MEHRHOFF.

APPEAL taken by James J. Treanor, Frank P. Treanor and the Yale Safe and Iron Company, three of the defendants, from judgment entered in favor of the plaintiff, upon report of referee to whom it was referred to hear, try and determine the issues, the defendant, Mehrhoff, not joining in such appeal.

Durnin & Hendrick (*B. Yates*, of counsel), for defend ants (appellants).

H. M. Hitchings, for plaintiff (respondent).

MCADAM, J. Every contract is to be construed so that it may have effect according to the intention of the parties, if that can be done consistently with the rules of law. *Parshall* v. *Eggert*, 54 N. Y. 18. It is generally competent, and often indispensable, in the construction of contracts, to refer to the subject-matter and other circumstances, and consider what the parties saw and knew, in order to ascertain their meaning. *Clark* v. *New York Life Ins., etc., Co.*, 64 N. Y. 33. In interpreting agreements, courts should look at the surrounding circumstances, the situation and relations of the parties, and the subject-matter of their negotiations. *Bank of Montreal* v.

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Recknagel, 109 N. Y. 482. The referee, after availing himself of these side lights, put a construction upon the instrument consistent with the document itself and in harmony with the circumstances, the subject-matter and the relations of the parties to it. The evidence satisfactorily sustains his findings on the facts as to these matters, and as there was a conflict in the proofs, there is no valid reason why the conclusions necessarily following from the facts found should be disturbed. This applies as well to the rights and obligations of the parties in respect to the item of $866.66, allowed by the referee, as the plaintiff's right to the ten per cent commission, which, under the written agreement, according to the construction placed upon it by the referee, was to be paid whether the contract with the corporation of Long Island City "resulted in a profit or loss." The other issues upon which the result depended were also the subject of conflicting evidence, and the referee's finding upon the facts being satisfactorily sustained by the proofs, should also be accepted as conclusive in respect thereto upon this review. The facts are so numerous and depend for their intelligent understanding upon so many contingencies that a lengthy discussion of them in an opinion would hardly make interesting reading. Suffice it to say that the facts established and found sustain the conclusion reached by the learned referee, and that the judgment entered upon his report must be affirmed, with costs.

FREEDMAN and GILDERSLEEVE, JJ., concur.
Judgment affirmed.

TOWNSHEND *v.* DULL.

APPEAL from judgment for plaintiff on demurrer to complaint.

FREEDMAN, J. This is an appeal from a judgment in favor of the plaintiff after decision overruling defendant's demurrer to complaint. The appellant has not appealed from the order for judgment, and, as the judgment follows the order, the

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appeal might be disposed of on that ground. But the judgment is right on the merits for the reasons assigned by the learned judge below.

The judgment should be affirmed, with costs.

GILDERSLEEVE, J., concurs.

Judgment affirmed.

MOSS *v.* MANHATTAN RAILWAY COMPANY.

APPEAL from judgment of Special Term.

L. C. Dessar (*Joseph B. Reilly*, of counsel), for plaintiffs (respondents).

Davies & Rapallo (*Herbert Barry*, of counsel), for defendants (appellants).

GILDERSLEEVE, J. The judgment enjoins and restrains the maintenance and operation of defendants' elevated railroad in front of premises No. 371 Pearl street, unless they pay to plaintiffs the sum of $3,000, and it also awards to plaintiffs $1,822.84, damages and costs.

The action seems to have been carefully tried; no exceptions were taken to the admission or rejection of evidence; and a fair preponderance of evidence sustains the findings of the court below and justifies the judgment.

It follows that the judgment appealed from must be affirmed, with costs.

FREEDMAN and MCADAM, JJ., concur.

Judgment affirmed.

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HOFFMAN *v.* NEWELL.

APPEAL from order of Special Term.

Theo. T. Baylor (*Alex. Thain*, of counsel), for plaintiff (appellant).

Kneeland, Stewart & Epstein (*Ira B. Stewart*, of counsel), for defendant (respondent).

Per Curiam. The order appealed from is affirmed, with ten dollars costs and disbursements, on the opinion of the court below.

Order affirmed.

OTTMAN LITHOGRAPHING CO. *v.* EQUITABLE BANK.

APPEAL from judgment of trial term, rendered by the court without a jury.

Goepel & Raegner (*Benj. B. Kenyon*, of counsel), for plaintiffs (respondents).

Charles F. McLean (*Edward W. Crittenden*, of counsel), for defendant (appellant).

Per Curiam. The judgment appealed from is affirmed, with costs, on the opinion of the court below.

Judgment affirmed.

RICHMOND *v.* WOOLFOLK.

APPEAL from order denying defendants' motion for a bill of particulars.

Per Curiam. The order should be affirmed, with ten dollars costs and disbursements, on the opinion of the Special Term.

Order affirmed.

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BUCKEL *v.* SUSS.

APPEAL from judgment of the trial term dismissing complaint, and from order denying motion for new trial.

Charles Steckler, for plaintiff (appellant).

Guggenheimer & Untermeyer (*Samuel Untermeyer*, of counsel), for defendant (respondent).

Per Curiam. For the reasons set forth in the opinion of the court below, the judgment and order appealed from are affirmed, with costs.

Judgment and order affirmed.

GILLETT *v.* WHITING.

APPEAL by defendant from judgment entered in favor of the plaintiffs, upon the verdict of a jury, and from order denying defendant's motion for a new trial.

Per Curiam. This case has been retried in strict conformity with the opinion of the Court of Appeals upon the former appeal, reported in 120 N. Y. 402. There was sufficient evidence upon the question of ratification to require the submission of the question to the jury, and the record discloses no error in the admission or exclusion of evidence, or in the instructions given to, or withheld from the jury. Nor can the verdict be held to be against the weight of the evidence. The judgment and order should be affirmed, with costs.

Judgment and order affirmed.

CLUFF *v.* DAY.

Per Curiam. The exceptions taken by the defendants should be overruled, and the plaintiff should have judgment on the verdict, with costs.

Judgment for plaintiff.

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TROWBRIDGE *v.* HARRISON.

APPEAL by defendants from judgment entered in favor of the plaintiffs upon the report of a referee.

Per Curiam. The judgment should be affirmed, with costs, upon the opinion of the referee.

Judgment affirmed.

TALLMADGE *v.* LONNSBURY, as Treasurer, etc.

APPEAL from judgment dismissing complaint entered on the report of referee.

Per Curiam. The judgment should be affirmed, with costs, for the reasons set forth in the memorandum of decision filed by the referee.

Judgment affirmed.

NEW YORK SUPERIOR COURT—GENERAL TERM, JANUARY, 1893.

HENSCHEL *v.* HARLEM REPORTER Co. et al.

William G. McCrea, for plaintiff (respondent).

Charles W. Dayton, for defendant (appellant).

DUGRO, J. A careful examination of the papers fails to show any improper exercise of discretion by the court at Special Term. The original complaint sufficed for one kind of relief. The supplemental complaint is but for more extensive relief. *Latham* v. *Richards*, 15 Hun, 129.

Order affirmed, with ten dollars costs.

SEDGWICK, Ch. J., and GILDERSLEEVE, J., concur.

Order affirmed.

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ROEMER *v.* STRIKER.

Learned & Warren, for plaintiff (appellant).

Dunning & Fowler, for defendant (respondent).

DUGRO, J. A careful examination of the case discloses no error. The work contracted for was in itself lawful, and not apt to require, if properly done, any act which would be likely to cause injury. The defendant cannot, therefore, be held liable for the negligence of the contractor. The surprise which the plaintiff intimates was caused by the evidence offered in behalf of the defendant, was probably due to the fact that the complaint, in alleging that the defendant "blasted the rock in so careless * * * a way," allowed a general denial to leave in doubt whether it referred to the blasting or the carelessness, or both. The authorities referred to upon the respondent's brief are in point.

The judgment is affirmed.

GILDERSLEEVE, J., concurs.

Judgment affirmed.

NEW YORK SUPERIOR COURT — GENERAL TERM, FEBRUARY, 1893.

PEASLEE *v.* PEASLEE.

APPEAL from an order of the Special Term, striking out part of answer.

Daniel G. Rollins, for plaintiff (respondent).

Arnoux, Ritch & Woodford (*William H. Arnoux*, of counsel), for defendants (appellants).

Per Curiam. The law, as declared on the former motion to strike out the paragraph similar to the one in question here, contained in the answer to the original complaint in this action, is final and conclusive between the parties hereto. The order made on that motion has not been appealed from, and stands unmodified and unrevoked. This application presents no

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grounds or question that did not exist at the time of the former application, and that was not then as fully within the defendants' knowledge as now. The motion herein was properly granted.

The order appealed from must be affirmed, with ten dollars costs and disbursements.

Order affirmed.

CULLIFORD *v.* GADD.

Sidney Harris, for defendant (respondent).

F. Spiegelberg, for plaintiff (appellant).

Per Curiam. As the respondent failed to except to the sureties within the time allowed, the undertaking became perfect for the purposes of the appeal.

The reason advanced for the plaintiff's failure to except to the sureties does not satisfy us that he should now be accorded an opportunity to examine them. If the circumstances of the sureties are, at any time after the execution of the undertaking, precarious, section 1308 of the Code of Civil Procedure suggests a way for relief.

We believe the order of Special Term should be affirmed, without costs.

Order affirmed.

QUEEN *v.* BELL.

APPEAL from a judgment dismissing plaintiff's complaint entered upon findings of fact, etc., made by a judge at Special Term.

H. B. Kinghorn, for plaintiff (appellant).

J. Stewart Ross, for defendants (respondents).

SEDGWICK, Ch. J. The relief claimed by the plaintiff was that he be adjudged the equitable owner of a lease taken by the defendants in their name and that they be adjudged to assign it to him.

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The ground as claimed for this relief was that when defendant Bell obtained the lease, with the other defendant French, Bell was the broker and agent of the plaintiff, employed to obtain a lease of the kind that was afterwards made. Apart from this ground the plaintiff makes no claim. The court has found that Bell was not the plaintiff's broker and agent. The learned counsel for the appellant argues that this finding is contrary to the testimony. The conclusion argued for can only be reached by ascertaining that the credibility of the plaintiff and his witnesses is superior to that of the defendants and their witnesses. This does not here appear. The conflict between the parties was strong. There is no fact or combination of facts that determines the case in favor of the plaintiff, and the finding below should be sustained.

Another finding, conclusive with nature, must be sustained. It was found that the plaintiff gave up definitely his attempt to obtain the lease, before the defendants took the lease. This must also be sustained on the judge's rendering of the facts.

Judgment appealed from, affirmed, with costs.

QUEEN *v.* BELL.

APPEAL from an order denying a motion by plaintiff for a new trial, made at Special Term, upon an affidavit and upon the case as settled.

SEDGWICK, Ch. J. The first ground upon which the new trial was asked, was that of newly-discovered evidence. The affidavit used to support this was insufficient. It contained no proof of facts but of admissions, or rather inferences from them, said to be contained in an examination of Bell, taken in proceedings supplementary to execution. But the examination was not produced. The facts intimated, rather than stated, were not of prevailing inportance, and some of them could not be given in evidence. It would appear that all that was relevant and that might have been proven could have been had upon the trial.

Another ground for asking a new trial was as follows: In response to plaintiff's requests to find, the judge made the fol-

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lowing note: "Each of the within requests is to be marked refused except so far as covered by the findings and conclusions signed and settled by me." It would not seem necessary to grant a new trial for such reason. The merits were not involved. The mistake of form, if it were one, might be remedied, by a motion to the judge himself, but on the contrary, the plaintiff allowed the proceedings to go on to the settlement of the case and did not ask that the judge should sign each request refused, etc. There seemed to be acquiescence in the action of the judge in respect of the requests of plaintiff.

Order affirmed, with requests.

GIEGERICH, J., concurs.

Order affirmed.

THOMAS ROBERTS STEVENSON CO. *v.* ALDRICH.

Philip & Avery, for plaintiff (respondent).

Spencer Aldrich, for defendant (appellant).

Per Curiam. A careful examination of the case discloses no error requiring reversal. There was no lien or incum brance, other than the mortgages referred to in the agreement of June, 1891, upon the premises in question at the time the buildings were substantially finished. The taxes became a lien at a time subsequent to the completion. True they were so prior to the receipt of Owen's certificate, but the agreement read: "That none of the above advances shall be made if, when such advance becomes due, according to the terms of this contract as above specified, there shall be any lien," etc., and the terms referred to as above specified made no refer ence to the time of the receipt of the certificate, but read that the payment should be "when the said five buildings are in all other respects completely finished."

The referee has found upon conflicting evidence that the buildings were substantially completed November 1, 1891, and of this the appellant complains. Upon the whole case we are disinclined to disturb the finding, though the question with respect to it is one not free from doubt.

Judgment affirmed, with costs.

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NEW YORK COMMON PLEAS — GENERAL TERM, DECEMBER, 1892.

BARREAU *v.* HUTCHINSON.

MOTION for reargument of appeal denied June 30, 1892.

H. A. Vieu, for plaintiff (appellant).

T. F. Gibbons, for defendant (respondent).

Per Curiam. The vice of appellant's contention is that it assumes the letter of September tenth, addressed by defendant's wife to plaintiff to be an unequivocal and absolute repudiation of the contract of employment, whereas the justice below apparently construed it to have been no more than a proposition that plaintiff consent to a modification of the terms of the contract theretofore made; and as in our opinion the letter is susceptible of the latter construction it necessarily follows that appellant has not sustained the burden of showing error for which the judgment appealed from must be reversed.

Motion denied, with ten dollars costs.

NEW YORK COMMON PLEAS — GENERAL TERM, FEBRUARY, 1893.

SQUIRE *v.* SENIA.

APPEAL from a judgment for plaintiff entered upon a verdict directed by the court. Action to recover upon an undertaking given to obtain an order of arrest pursuant to the provisions of section 559 of the Code of Civil Procedure.

William R. Wilder, for plaintiff (respondent).

T. D. Kenneson, for defendants (appellants).

BISCHOFF, J. The facts as they transpired on the trial of this action, are the same as in *Squire* v. *McDonald*, *ante*, page 422,

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herewith decided, and the question urged for review does not differ in any respect from the one there discussed.

We affirmed the judgment appealed from upon the ground that the order vacating the order of arrest issued against the plaintiff in an action against him for the alleged conversion of personal property, and which had become final by lapse of time within which an appeal therefrom should be taken, is a final decision that plaintiff in the action for conversion was not entitled to the order of arrest, notwithstanding that the action may result in a judgment for plaintiff, and that because of the identity of the cause of arrest with the cause of action such a judgment would imply that the plaintiff was entitled to an order of arrest.

The judgment herein appealed from must, therefore, likewise be affirmed, with costs.

DALY, Ch. J., and PRYOR, J., concur.
Judgment affirmed.

MERRITT *v.* GOODRICH.

APPEAL from a judgment of the General Term of the City Court of New York, affirming a judgment for plaintiff entered upon a verdict directed by the trial court.

Action by the assignee of a creditor of the American Loan and Trust Company, to enforce defendant's liability as a director under a provision of the charter of the company that "every director shall be personally liable for debts incurred by the corporation during his administration to an amount not exceeding five thousand dollars."

Marshall P. Stafford, for plaintiff (respondent).

Payson Merrill, for defendant (appellant).

BISCHOFF, J. The questions involved on this appeal do not in any respect differ from those determined by us in *State Bank of Rock Valley* v. *Andrews*, *ante*, page 394, the decis-

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ion wherein is herewith handed down. In that case our conclusions were that the defendant's liability to a creditor of the American Loan and Trust Company, imposed by its charter, for all debts of the corporation incurred while he continued to be a director, is enforceable in an action at law instituted by the creditor without joining other creditors or directors; and that the prior recovery of judgment against the company, and return of execution issued thereunder, were not essential to the maintenance of the action.

The judgment of the General Term of the court below should be affirmed, with costs.

BOOKSTAVER and PRYOR, JJ., concur.
Judgment affirmed.

TINKHAM *v.* KNOX.

APPEAL from a judgment of the General Term of the City Court of New York, affirming a judgment entered on the verdict of a jury.

W. C. Beecher, for plaintiff (appellant).

J. Van Vechten Olcott, for defendant (respondent).

BOOKSTAVER, J. This action was brought to recover commissions for the letting of certain premises owned by defendant's testator, which letting plaintiff claims to have been procured through him. There is no allegation in the complaint that he was ever employed by the defendant's testator as a broker, the sole ground for recovery as alleged in the complaint being that the defendant, with knowledge that the services had been rendered, accepted the same, and entered into a lease with the tenant procured by the plaintiff. The fact of employment was denied by the defendant, as well as the rendition of services, and evidence on both sides was given on these questions sufficient to require their submission to the jury, which was done in a charge so fair that the plaintiff did

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not except thereto, and their conclusions upon these questions must be final.

The only questions reviewable by this tribunal are one exception to the refusal of the court to charge, and two or three exceptions to the admission of evidence. The request to charge was that while the owner is entitled to know that the broker has been instrumental in sending the tenant, yet when he learns that the tenant has received information of his intention to let and his price, the owner is bound to inquire whence the tenant got his information; which the court refused to charge, and plaintiff excepted. We know of no law supporting this exception and the appellant has referred us to no authority. The exception is not well taken, because the request presupposes that leases are never made without the intervention of brokers and that no information could be received as to what property was to be let except through them, which is manifestly not the case.

On cross-examination the plaintiff was asked whether he understood that the agreement between Mr. Livingston and Mr. Dean was completed at a certain time, which was allowed under plaintiff's objection, and to which he excepted. This question on cross-examination was entirely proper, as it related to one of the issues in the case and tended to show whether or not services had been rendered and accepted by the defendant's testator at the time, and did not call so much for a conclusion as for his understanding of the status of the negotiations at that time. And this also disposes of the exception to the question put to the plaintiff on cross-examination as to whether or not he considered the agreement between him and the defendant's testator a perfect agreement at a particular time. Even if the question asked of one of defendant's witnesses as to the meaning of a certain expression in a letter were well taken, it cannot avail him here, as the question was not answered. If the objection was to the answer it could only be taken advantage of by a motion to strike it out.

The judgment should, therefore, be affirmed, with costs.

Bischoff and Pryor, JJ., concur.

Judgment affirmed.

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REYNOLDS *v.* MANHATTAN ATHLETIC CLUB.

APPEAL from a judgment rendered in favor of plaintiff in a District Court of the city of New York. The opinion states the case.

George W. Carr, for defendant (appellant).

Hiram Ketchum, for plaintiff (respondent).

BOOKSTAVER, P. J. Reynolds, a professional boxer, brought this action upon an oral complaint to recover ninety-nine dollars for breach of a contract signed by him only, which was not offered in evidence, but the contents of which are testified to without objection, and which was substantially as follows: Reynolds agreed to box A. L. O'Brien at defendant's club house on June 22, 1892, ten rounds, for $300, $200 to the winner and $100 to the loser, Reynolds to put up fifty dollars forfeit in Dominick McCaffrey's hands for appearance and weighing in. The answer was a general denial. Reynolds put up his fifty dollars as provided for in the contract, appeared and weighed in and began the boxing contest, but boxed only two out of ten rounds. He himself testifies that he stopped because he was fouled and hurt, and although he says he told his seconds he was ready and willing to stay the ten rounds, he does not testify that he so told McCaffrey, the referee, or any one else than his seconds. The testimony on both sides was that the referee's decision in boxing contests is final as to all questions. Defendant's testimony goes to prove that the contest was under what is known as the Marquis of Queensberry's rules, although they were not put in evidence, and also under the club rules, which defendant's witnesses said were communicated to the plaintiff before the match, and this he does not deny. It was testified that under both of these rules there is an interval of one minute each round, and that if a contestant is knocked down during a round and remains down for ten seconds, he is counted out of the contest, and in this event gets second money; but if a contestant makes a pretense of being knocked down and out or "quits,"

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as it was called in technical sporting parlance, he would not even be entitled to second money; and that it was the province of the referee to decide whether a contestant quits or, as it is otherwise called, "fakes," or is fairly knocked out, and his decision on this question is also final. The plaintiff admitted in his testimony on the trial that the referee determines the fight and the money. The referee did determine that O'Brien, the plaintiff's opponent, was the winner, and that Reynolds was not entitled to any money, as he he had quit, that is, had willfully evaded further sparring.

If this contest was to have been had solely under the terms of the contract plaintiff signed, then he cannot recover, and it was error to so decide, for he agreed to box ten rounds and it is admitted he boxed two only. He seeks to avoid this apparent breach of contract by now claiming that he was ready and willing to go on with the remaining rounds, but the testimony is overwhelmingly against this contention. The only testimony to support his then-alleged willingness and readiness to perform the contract, consists of his and his seconds' assertion at the trial that he was then ready and willing to continue the contest. Neither of them state that by word or act such readiness and willingness was indicated. What they say amounts to nothing more than an expression of plaintiff's mental state in this regard. They both admit that neither of them told the referee or any one of the officers of the defendant that plaintiff was ready to continue. Readiness to perform a contract is shown only by some act or word expressive of such disposition. Now, it is apparent that plaintiff did not perform the contract according to its terms, nor did he offer to do so. It is a fair and necessary presumption that such a contest would not be had except under some rules, and the uncontradicted testimony is that these rules were communicated to the plaintiff before the contest began, and he knew that the decision of the referee upon the question of quitting or being fairly knocked out was for the referee to determine and was final; his determination being that it was a willful quitting, therefore, is binding upon him and he cannot recover in this action. The only possible theory upon which the justice could have decided in plaintiff's favor is that he

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believed plaintiff did his best and was fairly knocked out. To this there are two insuperable objections. If he was fairly knocked out, which means rendered incapable of further contest, then his statements are irreconcilable. It is not contradicted that on the night in question he admitted he was knocked out; therefore, his present statement that he was ready and willing must be untrue. And again, what the justice believes as to whether plaintiff was fairly knocked out was inconsequential, as the parties had agreed to leave the disposition of that question to the referee, and he, and not the justice, was to decide whether the plaintiff was fairly overcome or quit, and he decided against the plaintiff. Whenever defendant's witnesses speak of plaintiff being entitled to the money if fairly knocked out they must mean if the referee were of the opinion that he was fairly knocked out, otherwise the disposition of the question would rest with the contestant, or could never be decided where a dispute occurred, except by a court. The parties, under the agreement between them, made the referee the sole arbiter of this question.

The judgment should, therefore, be reversed, with costs of this appeal to the appellant.

BISCHOFF, J., concurs.

Judgment reversed.

ECKENROTH *v.* VOUGHT.

APPEAL from a judgment of a District Court of the city of New York, rendered in favor of plaintiff.

John J. McKelvey, for defendant (appellant).

Robert O'Byrne, for plaintiff (respondent).

BOOKSTAVER, P. J. On the trial it was stipulated that the plaintiffs sold and delivered to the defendant the merchandise specified in plaintiff's bill of particulars, and the defendant agreed to pay the reasonable value thereof, and that the reasonable value of the merchandise sold on September 3, 1890, was specified in the bill of particulars, and that defendant had paid on account $388.23, which he claimed to be the reason-

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able value; but plaintiff claimed $101.27 in addition to the $388.23, out of which he admits there should be an allowance of $19.27. It was further admitted that of the fifty-four turned posts mentioned in the bill of particulars, thirteen were locust, and reasonably worth eight dollars and seventy-five cents each, and the remaining posts, forty-one in number, were yellow pine, the reasonable value of which is the item in dispute in this action. It was further conceded by defendant's attorney, that if plaintiffs succeeded on the trial, they could recover eighty-two dollars. The matter at issue is thus narrowed down to what was the reasonable value of the forty-nine pine posts furnished to defendant by plaintiffs. The original contract under which the fifty-four posts were to be made and delivered, called for locust posts, but it was modified after the delivery of thirteen locust posts, so that the forty-one remaining were to be of pine. Upon this question both parties offered considerable evidence, some of it being by parties interested, and other by expert witnesses. A careful review of the evidence does not convince us that there was such a preponderance in favor of the defendant that the judgment should have been in his favor.

There is quite sufficient evidence on behalf of the plaintiff to warrant the finding of the court below, and the judgment should, therefore, be affirmed, with costs.

Bischoff, J., concurs.

Judgment affirmed.

Stevens *v.* The Metropolitan Life Ins. Co.

Appeal from a judgment for plaintiff entered upon a verdict in his favor, and from an order denying defendant's motion for a new trial, made on the minutes. Action for damages for plaintiff's malicious prosecution upon a charge of larceny.

Edward F. O'Dwyer for plaintiff (respondent).

C. N. Bovee, Jr., for defendant (appellant).

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BISCHOFF, J. Plaintiff had been in defendant's employ as a solicitor of insurance and collecting agent for a period of about two years immediately preceding May 10, 1889. On that day he resigned from the employment, and on the twenty-first day of the same month he was apprehended on a criminal charge preferred against him by defendant. The charge was larceny, and involved the alleged felonious misappropriation of one dollar and forty cents which had been paid him for defendant by one of its policy holders. Upon this charge plaintiff was indicted by the grand jury, and subsequently tried and acquitted. Thereafter he brought this action to recover damages for his alleged malicious prosecution. The jury awarded him $2,000, and from the judgment which was entered on the verdict and the order which refused it a new trial on the minutes, defendant appealed.

Whether defendant had "probable cause" for, or was actuated by "malice" in the criminal prosecution, were questions which, in the present case, depended mainly upon the further question whether, or not, plaintiff had truthfully testified that, at the time of tendering his resignation from defendant's employ, he had admitted having made collections and demanded to be informed of the amount due him for "reserve salary," and had offered to pay whatever he should be found to be owing defendant for money collected for it. Williams, defendant's superintendent, denied the fact of such an admission, demand and offer, and testified that plaintiff denied having made any collections, but it was the province of the jury to determine this conflict of evidence as well as the degree of credibility to which the witnesses, both being interested in the result of this action, were respectively entitled. The motions for dismissal of the complaint and for the direction of a verdict for defendant were, therefore, justly denied.

In *Willard* v. *Holmes, Booth & Haydens*, *ante*, page 303, we stated the legal principles which should control on the trial of an action for malicious prosecution, and careful consideration of the several exceptions to the rulings has resulted in our conclusion that these principles were not departed from on the trial of this.

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The learned trial judge correctly ruled out evidence tending to show that at or about the time defendant caused plaintiff's arrest he was guilty of an attempted fraud upon defendant utterly disconnected with the alleged crime of which he was accused. Plaintiff was not called upon, either in this action or in the criminal prosecution, to defend an accusation of such attempted fraud. It was for that reason irrelevant and incompetent, and in so far as appellant's counsel urges that the evidence excluded was admissible because less convincing evidence is required to establish "probable cause" for the prosecution of a person suspected of crime if he is known to be of ill-repute, he trespasses upon the rule which forbids proof of ill-repute by evidence of specific acts.

Defendant's counsel requested the court to charge that the facts that the police magistrate entertained the complaint in the criminal prosecution and issued a warrant for plaintiff's apprehension, that plaintiff waived a preliminary examination in the police court, that he was subsequently indicted by the grand jury, that on trial of the indictment the question of plaintiff's guilt was submitted to a jury, and that the jury deliberated for some time before arriving at a verdict of plaintiff's acquittal, constituted *conclusive* evidence of "probable cause" for plaintiff's prosecution, and to the refusal so to charge exception was taken. As the matters mentioned, however, at most, were *prima facie* evidence of "probable cause" (Newell Mal. Pros. chap. 7, § 19, subd. 2, p. 290), the request was properly refused and the exception is without force.

The judgment and order appealed from should be affirmed, with costs.

Bookstaver and Pryor, JJ., concur.

Judgment and order affirmed.

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CITY COURT OF NEW YORK — GENERAL TERM, FEBRUARY, 1893.

McCarthy *v.* Gallagher.

H. A. Brann, for defendant (appellant).

Johnston & Johnston, for plaintiff (respondent).

Fitzsimons, J. The plaintiff is a painter and the defendant is a builder. The plaintiff agreed to paint houses Nos. 261 and 263 Madison street, owned by defendant, according to the terms of a certain written agreement. The plaintiff's testimony is to the effect that he fully and fairly complied with the terms of his contract. The defendant's testimony contradicts this statement, and claims that the plaintiff failed to do all the work he agreed to do, and that the work done was carelessly done, and unworkmanlike, and that improper materials were used. In this case, as in all cases of similar character, we find the defendant contradicting the plaintiff upon nearly every material and immaterial question involved, and in such event it was of course the duty and function of the trial justice to determine which party told the truth. He did so in this case by selecting the plaintiff and his witnesses as the truthful ones, and as he had the advantage of seeing the witnesses, noticing the manner in which they delivered their testimony, and having the privilege of seeing the many things which usually occur during a trial, and which are indescribable, appealing to the instinct rather than the reason, but which, just as surely as the most positive and convincing oral testimony, point out where the truth lies; and as there is ample evidence to sustain his findings, and finding no errors, we would not be justified in doing otherwise than sustaining them. The judgment must, therefore, be affirmed, with costs.

McGown and Van Wyck, JJ., concur.
Judgment affirmed.

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MARTIN *v.* RAFFIN.

APPEAL from an order vacating and setting aside the summons herein, and service thereof upon defendant.

Stickney, Spencer & Ordway, for defendant (respondent).

Frederick K. Clark, for plaintiff (appellant).

FITZSIMONS, J. This is an appeal from an order vacating and setting aside the *summons* herein, and the *service* thereof upon defendant. The defendant resides in Tremont; the process server called there twice to serve him with the summons herein, and some other papers. On his second visit he found the defendant actually in the shelter of his wife's petticoats, he having sought that means of protection for the purpose of avoiding service of the summons herein. While in that position he was invited to accept service of the said summons, which he refused to do. The summons, and other legal papers, were then laid upon his shoulder, and he shook them to the floor. The appeal is based upon two points: (1) That the service as above described, involved an assault upon defendant's person. (2) That it was effected by a trick, viz., concealing the process among a number of other papers entitled in another action or proceeding. I cannot imagine how the service in question involved an assault upon defendant; even the defendant swears that the papers served upon him were *laid* upon his shoulder. No violence or force, or even show of violence or force, was used to accomplish the service. He refused to receive them in his hand, and, therefore, in my opinion, the manner of service adopted was the only other way left to make service, and was certainly justifiable; in fact, the entire conduct of defendant was disrespectful to, and exhibited a contempt for *courts* and legal process, which should not be encouraged by setting aside the service of the summons herein. In fact, his conduct was so reprehensible that it would please me to punish him for contempt, if possible. To say that a person may avoid service of legal papers by refusing to accept

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the same, is to degrade the law and courts in the eyes of persons like defendant. As to second point, that the service was effected by a trick, the mere recital of the means of service herein is a sufficient refutation of that claim. No trick was used, and the summons might easily have been seen and read by defendant, if he chose to do so. It was not concealed among the other papers served upon defendant at the time of the service of said summons. The service herein, under the circumstances related, was proper. The order appealed from is reversed, with costs, with leave to defendant to appear within three (3) days after service of order entered hereon upon defendant's attorneys.

McGown and Van Wyck. JJ., concur.
Judgment accordingly.

LECK *v.* BRAENDER.

APPEAL by defendant from judgment entered in favor of the plaintiff on a verdict of a jury and from order denying new trial.

VAN WYCK, J. The appellant's counsel, although discussing some exceptions to the ruling of the judge as regards instructions to the jury, frankly states in his brief that "the main ground of this appeal is, that on all the evidence, the verdict of the jury was contrary to the evidence and contrary to law, and is raised by the appeal from the order denying the motion made for a new trial." However, a careful reading of all the evidence adduced on the trial forces the conclusion that the verdict is not against the evidence, weight of evidence or law, and that the same is fully justified by the evidence and the legal inferences which a jury has the right to draw from the specific facts proven on the trial.

The judgment and order should be affirmed, with costs.

FITZSIMONS, J., concurs.
Judgment and order affirmed.

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MOROWSKI *v.* ROHRIG.

This action was brought to foreclose a mechanics' lien for balance due on contract and for extra work, and judgment was entered in favor of the plaintiffs for the sum of two hundred and eighty-five dollars ($285) for extra work, upon the findings of fact and conclusions of law made by the trial justice, at an equity term of this court.

Gumbleton, Flanagan & Hottenroth, for plaintiffs (respondents).

Simon Sultan, for defendant (appellant).

MCGOWN, J. After a careful examination of the appeal book herein, of the rulings and findings of the trial justice, and of the exceptions taken by the attorney for the defendant on the trial herein, we find no error committed by the trial justice, and that there are no merits in the exceptions taken herein.

Judgment appealed from must be affirmed, with costs to the respondents.

VAN WYCK and FITZSIMONS, JJ., concur.

Judgment affirmed.

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LIST OF DECISIONS—NO OPINIONS.

(New York Common Pleas—General Term, January, 1893.)

BOOKSTAVER, P. J., BISCHOFF and PRYOR, JJ.

American Artistic Gold Stamping Co. *v.* The Glens Falls Ins. Co. Thos. Brennan, for plaintiff. Thos. M. Wyatt, for defendant. Motion for leave to appeal to the Court of Appeals. Motion denied, with ten dollars costs.

The People of the State of New York *v.* John Carroll and Wm. Corrigan. De Lancey Nicoll, for plaintiff. Jas. A. O'Gorman, for defendant. Motion to vacate judgment entered on a forfeited recognizance. Motion granted.

The People of the State of New York *v.* Gussie Brown and David Manus. De Lancey Nicoll, for plaintiff. F. J. Worcester, for defendant. Motion to vacate judgment entered on a forfeited recognizance. Motion granted.

In the Matter of the Application of the American Surety Co. Alexander & Green, for petitioner. Application of the American Surety Company of New York, for a rule or order respecting the approval of bonds and undertakings guaranteed or executed by said company and for a modification of the order of the General Term of this court of May 2, 1892. Application granted.

The People of the State of New York *v.* James Hassan and Joseph Finnerty. Louis Hannemann, for plaintiff. Joseph H. Steiner, for defendant. Motion to discharge judgment entered on a forfeited recognizance. The defects noted at the November General Term having been supplied on this application, and as it now appears that the people have suffered no damage, the application will be granted.

William Riley and another *v.* Alexander G. Black. Samuel E. Duffey, for plaintiff. Bartlett, Wilson & Wilson, for defendant. Motion for leave to appeal to the Court of Appeals. Motion denied, with ten dollars costs.

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George W. Wilson *v.* Manhattan Ry. Co. E. T. Daly, for plaintiff. Davies, Short & Townsend, for defendant. Motion for case to go to the Court of Appeals. Motion granted.

Gordon Cunard *v.* Manhattan Railway Co. John A. Weeks, Jr., for plaintiff. Davies & Rapallo, for defendant. Motion for reargument. Motion denied, with ten dollars costs.

John Van Tassel *v.* New York, Lake Erie and Western R. R. Co. Buchanan & Steele, for plaintiff. Smith, Bowman & Close, for defendant. Motion for reargument denied, with ten dollars costs.

The People of the State of New York *v.* Solomon Wolff and Isaac Goldstein. De Lancey Nicoll, for plaintiff. Alex. S. Rosenthall, for defendant. Motion to vacate judgment entered on a forfeited recognizance. Motion granted.

Leopold Manheimer *v.* Moritz Lowenthal. A. H. Berrick, for plaintiff. Eugene Cohn, for defendant. Motion for restitution. Motion denied, with ten dollars costs to abide the event.

(New York Common Pleas — General Term, February, 1898.)

H. Bischoff, Jr., P. J., and Pryor, J.

Catherine Kern, Respondent, *v.* Phillipina Klein, Appellant. W. H. Geiger, for respondent. A. G. Vanderpool, for appellant. Appeal from judgment of the Sixth District Court, Hon. S. Lachman, J. Judgment reversed, new trial ordered, costs to the appellants to abide the event.

John A. Baines, Respondent, *v.* Henry DeForrest and Others, Appellants. H. M. Green, for respondent. C. H. Pryer, for appellants. Appeal from the judgment of the Ninth District Court, Hon. Joseph P. Fallon, J. Judgment reversed, new trial ordered, costs to abide the event.

The Lamson Consolidated Store Service Co., Appellant, *v.* Adolf Rothschild, Respondent. P. H. Friend, for appellant. P. C. Tallman, for respondent. Judgment of the Sixth District Court, Hon. S. Lachman, J. Judgment reversed, new trial ordered, costs to abide the event.

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Edward C. Boughton, Respondent, *v.* Abraham S. Davies, Appellant. Moses Esberg, for respondent. B. W. Traitel, for appellant. Appeal from order of discontinuance, Third District Court, Hon. W. F. Moore, J. Appeal dismissed without costs, the court on appeal having no jurisdiction.

Daniel Rosenbaum, Respondent, *v.* Emma Mollner, Appellant. B. Metzger, for respondent. M. B. Blumenthal, for appellant. Appeal from judgment of the Seventh District Court, Hon. J. B. McKean, J. Judgment affirmed, with costs.

M. C. Milnor, Respondent, *v.* James T. White, Appellant. M. C. Milnor, for respondent. O. J. Hochstadter, for appellant. Appeal from judgment of the Third District Court, Hon. Wm. F. Moore, J. Judgment affirmed, with costs.

Nathan Goldberg, Respondent, *v.* David Cohen, Appellant. J. Levy, for respondent. J. Levy, for appellant. Appeal from judgment of Fifth District Court, Hon. H. M. Goldfogle, J. Judgment reversed, new trial ordered, costs to appellant to abide the event.

Walter T. Parker, as Surviving Partner, Respondent, *v.* A. W. Lightbourne, Appellant. Stapler, Short & Townsend, for respondent. C. C. Ferris, for appellant. Appeal from judgment of the Eleventh District Court, Hon. Thomas E. Murray, J. Judgment affirmed, with costs.

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3. The determination of a disputed question of fact tried before a justice without a jury will not be interfered with on appeal unless there is a palpable miscarriage of justice. *McGrath* v. *Mangels.* 60

4. A contention made by a party on an appeal which is inconsistent with his attitude on the trial is not available. *Id.*

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9. Discretionary orders of the City Court are not reviewable by the Court of Common Pleas, except, perhaps, when they exhibit an abuse of discretion. *Id.*

10. To review an error of fact, the case must purport to contain all the evidence. *Meislahn* v. *Englehard.* 187

11. To review an error of law, such certificate is unnecessary. *Id.*

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14. The appellate court will not as a rule review mere offers of evidence. *Pucci* v. *Barney.* 354

15. While an appellate court will not as a rule review exceptions taken to mere offers of evidence, yet when from an inspection of the record it appears that they were made in absolute good faith and for the purpose of facilitating the business of the court, and with its sanction and without objection from the other party, the court is justified in departing from the rule and should determine the case upon the exceptions as if they had been to testimony actually offered and excluded. *Gerard* v. *Cowperthwait.* 371

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where an assignee for creditors, after having filed his bond and entered upon the discharge of the duties of his trust, dies, his executrix, as the personal representative of the deceased assignee, is entitled, under Laws of 1877, chapter 466, section 10, to be made the substituted assignee, upon giving a bond, duly approved. *Matter of Magnus.* 347

2. Upon October 14, 1892, an order to show cause was made, why an *ex parte* order of September 30, 1892, substituting the deceased assignee's executrix as assignee should not be vacated and set aside, and why she should not account for all property of the assigned estate which had come into her hands as executrix of her husband, the deceased assignee. *Id.*

3. On November 11, 1892, an order vacating the order of September 30, 1892, was granted, removing the executrix as substituted assignee in place of her deceased husband, and appointing another in her stead as substituted assignee. *Held*, that as the deceased assignee's executrix was entitled to execute the duties of the trust upon giving bonds, the order of November eleventh should be vacated and set aside. The order of September thirtieth having been made without notice to any creditor or the surety, and on a notice of less than eight days, and without providing that any bond should be given, should not be restored, but a new order entered substituting the executrix as assignee in place of her deceased husband, upon giving a bond, duly approved. *Id.*

4. Laws of 1882, chapter 185, providing that upon the death of a trustee, etc., the trust estate shall not descend to the next of kin or personal representative, but the trust,

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if unexecuted, shall vest in the Supreme Court, and be executed by a person designated by that court, does not apply to general assignments for the benefit of creditors. *Id.*

ASSOCIATION.

An action lies against members of an unincorporated association without first obtaining judgment against the association. *Schwartz* v. *Wechler*. 67

ATTACHMENT.

1. Where a motion to vacate an attachment proceeds upon the papers upon which it was granted, plaintiff is entitled to all legitimate inferences from the facts shown. *Globe Yarn Mills* v. *Bilbrough*. 100

2. In an application by defendant to vacate an attachment against his property issued on the ground of nonresidence, it appeared that his domicile of origin was in Missouri. That while an infant his mother removed her family to Connecticut, for the purpose of completing their education. In 1890, defendant, still an infant, went to New York, established a business office, living at intervals at boarding houses and hotels until 1892, when he rented apartments which he thereafter shortly abandoned, stored his furniture and went to Maine on his summer vacation. While without the state the attachment was issued. *Held*, that under the circumstances defendant was not a resident of New York. That his residence must be presumed to be at the place of his domicile of origin until he had acquired a domicile of choice. *Eaves Costume Company* v. *Pratt*. 420

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BENEFIT SOCIETY.

W., a member of a benefit society, on June third, paid fifty cents for five months' dues, up to June first. On June fifth he died. The by-laws did not require dues to be paid in advance, but provided that any member being three months in arrears should not be considered "in benefit," until one month after he was clear on the books, and also that no member three months in arrears for dues, should be eligible to receive a funeral benefit of fifty dollars. *Held*, that W. was entitled to a funeral benefit. The by-laws further provided that new members were not eligible to receive a funeral benefit until six calendar months had elapsed after initiation. *Held*, that it appearing that W. was a member at the time of his death it was matter of defense to show that he had not been a member the required length of time. *Weiss* v. *Tennant*. 213

BILL OF PARTICULARS.

1. In an action to recover damages resulting from a single act, the detention and refusal to mail magazines to plaintiff's subscribers and advertisers, defendant is not entitled to a bill of particulars. *Home Maker Co.* v. *Alley*. 111

2. Defendant in his affidavit positively swore to his inability to comply with an order requiring of him a bill of particulars. Plaintiff did not contradict defendant's affidavit nor show in any manner that the defendant could give the information asked for. *Held*, that an order directing a bill of particulars to be given should be reversed. *United Building and Loan Bank* v. *Bartlett*. 479

3. In an action for admeasurement of dower, defendant denied plaintiff's claim that she was the lawful widow of defendant's testator, one J. H., deceased. Plaintiff, in pursuance of an order, served a bill of particulars, alleging that the allegation of widowhood, in the complaint, was founded upon a nonceremonial marriage, and giving the place and date thereof, and

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the parties present thereat. In an application by defendants for an additional bill of particulars, *held*, that the bill previously given was sufficiently comprehensive. *Halstead* v. *Halstead*. 501

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BROKER.

1. In an action to recover brokerage for procuring a purchaser for defendant's property, the plaintiff proved his employment to sell; that he found a purchaser to buy on the owner's terms, and that defendants ultimately refused to consummate the sale. The jury found for plaintiff. *Held*, proper; that as there was no proof of inability on the part of the proposed purchaser to perform his contract, ability would be presumed. *Gerding* v. *Haskin*. 172

2. In the absence of an agreement as to the amount of his compensation or of anything to show that his services were gratuitous, a real estate broker is entitled to recover upon *quantum meruit*, in this case, the usual commission paid for such services. *Baer* v. *Koch*. 335

3. One of the plaintiffs and one of his witnesses, for the purpose of showing what the plaintiffs did in regard to procuring property for defendant, were allowed to testify to conversations with persons, and not in the presence of defendants. *Held*, that the evidence was admissible in order to determine the *quantum meruit* to which plaintiffs were entitled. *Id.*

4. In an action for broker's commission on a sale of realty, it appeared that defendant employed one T. to make the sale. It was conceded that plaintiff was not retained directly by defendants, but that he was commissioned by their agent, T. T. testified, "We were both brokers in the matter; there was a sort of implied understanding between brokers that I would divide commissions with him." Plaintiff testified that T. "told me he would pay me a commission." Before commencing the action, plaintiff threatened suit for only half the commission. *Held*, that plaintiff's employment was by T. on an agreement to divide his commission; and that so, as subagent, plaintiff sustained no such relation to defendants as made them liable for his compensation. *Carroll* v. *Tucker*. 397

5. Also *held*, that assuming that T. employed plaintiff as broker for defendants, it was incumbent on plaintiff to prove that T. had authority so to do. *Id.*

6. Plaintiff claimed that defendants empowered T. to substitute another in his stead, which was denied by them. But plaintiff relied on an alleged admission of defendants to the contrary. Before commencing the action, plaintiff's attorney called on defendants to ascertain "whether T. had authority to bind defendants, or to sell and employ a broker." Defendants said "that T. was authorized to take any steps necessary to sell." *Held*, that this did not involve authority on T. to employ another broker. *Id.*

7. Also *held*, that the rule "when an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of his agent," does not apply so as to validate a delegation of his agency by a broker. *Id.*

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CALENDAR.

See TRIAL.

CARRIER.

1. Upon a purchase of property abroad to be delivered in the city of New York, the carrier is the seller's agent to make such delivery; but on the arrival of the goods at the carrier's depot in the city, the carrier becomes the agent of the buyer to make actual delivery. *Cochran Cotton Seed Oil Co.* v. *Haebler.* 251

2. In an action against a common carrier to recover damages for an injury to a piano shipped by plaintiff at Bridgeport, Conn., to Rochester, N. Y., it appeared that the contract was a special one by which defendant was released from its common-law liability; that at the time of shipping, a receipt therefor was received; that the piano was boxed in a secure and workmanlike manner, and that at the time of delivery at B., it was in first-class order; that from the time of its delivery to the truckman in R. until it was delivered at plaintiff's house, it was carefully handled, and when opened it was found in a broken and damaged condition. No explanation as to how the injury happened was given by defendant. A verdict was rendered in favor of plaintiff. *Held*, proper; the relation existing between plaintiff and defendant was contractual, and proof of the injury, as established by plaintiff, was at least *prima facie* evidence of negligence on the part of defendant, and its failure to explain it was sufficient to make it liable. *Bowden* v. *Fargo.* 551

CAUSE OF ACTION.

See EXAMINATION BEFORE TRIAL.
NEGLIGENCE.
PLEADING.
TRIAL.

CERTIFICATE.

See MECHANIC'S LIEN.

CHARTER.

See CORPORATION.

CHATTEL MORTGAGE.

Defendant repaired for the owner, a buggy upon which plaintiff held a chattel mortgage, duly filed, containing a clause that the buggy should not be removed from a certain barn, but the mortgagor was to have the possession and use of the buggy. The owner not paying for the repairs, defendant kept the buggy. The mortgagee demanded the buggy by virtue of his mortgage, and defendant refused to deliver it, claiming a lien for the repairs and also for storage after the demand of payment. In an action of replevin by the mortgagee, *held*, that defendant's lien for the repairs was superior to plaintiff's mortgage, as in the circumstances it must be assumed that plaintiff impliedly authorized the repairs, and was estopped from asserting that the lien of his mortgage was superior to that of plaintiff for repairs; but *held*, further, that the claim for storage was subordinate to plaintiff's mortgage for the reason that no implication arose that plaintiff consented to or was bound to take notice of such charge. *Tucker* v. *Werner.* 193

CHOSES IN ACTION.

See EXECUTION.

CITY COURT OF NEW YORK.

See APPEAL.
NEGOTIABLE INSTRUMENT.
NEW TRIAL.

CODE OF CIVIL PROCEDURE.

§ 820. *Taylor* v. *Satterthwaite.* 441
§§ 829. *Korminsky* v. *Korminsky.* 138
§§ 834, 836. *Matter of Loewenstine's Will.* 323
§§ 870, 873. *Wahle* v. *McMillan.* 343
§ 1022. *Gold* v. *Serrell.* 224
§ 2944. *Dows* v. *Morrison.* 54

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COMMISSION.

See BROKER.
TRUSTS AND TRUSTEES.

COMPLAINT.

—— *In action on note.*
See Wright v. *Deering.* 296

See CONTRACT.
MUNICIPAL COURT OF BUFFALO.
NEW TRIAL.
PATENT.
PLEADING.
TRIAL.

COMPOSITION DEED.

See NEGOTIABLE INSTRUMENT.

CONDITIONAL SALE.

See SALES.

CONSIDERATION.

See AGENCY.
CONTRACT.
GUARANTY.
INSURANCE.

CONSPIRACY.

In an action for conspiracy it appeared that the defendants represented certain labor organizations in the city of R., and that plaintiff was in the employ of a brewing company which was a member of the Ale Brewers' Association of that city. There was an agreement between the latter and the local assembly, of which defendant G. was president, that no brewery belonging to the association was to employ any person not a member of defendants organization, nor to retain in its employ any person who declined to join same. Plaintiff was not a member of the local assembly, and upon being solicited to join the same, declined. Defendants thereupon notified his employers of the fact, and he was discharged from its employ. These facts were set forth at length in defendants' answer, coupled with the allegation that their acts were without any intent or purpose to injure plaintiff. Plaintiff demurred to that part of the answer. *Held*, that the means employed by defendants to accomplish the objects of their organization not only contravened one of the fundamental principles of our free institutions, but it likewise violated the spirit if not the letter of section 171a of the Penal Code; that the said facts set forth in the answer by way of defense to plaintiff's cause of action, constituted an unlawful act and is demurrable. *Curran* v. *Galen.* 553

CONTEMPT.

See SUPPLEMENTARY PROCEEDINGS.

CONTRACT.

1. In an action to enjoin the violation of a contract, if the restriction imposed thereby is a reasonable one and not against public policy, and it is shown that the common law affords no adequate remedy, the equitable interposition of the court is justified, and an injunction should be granted. *Lowenbein* v. *Fuldner.* 175

2. Plaintiff settled an action to recover for personal injuries, to the prejudice of the defendant, O., his attorney, who had him arrested on a fictitious charge, and when he was discharged had him immediately rearrested upon an order of arrest granted in an action by defendant, O., to recover damages for the claimed fraudulent settlement. Pending an appeal from an order denying a motion to discharge the order of arrest, plaintiff executed and delivered a general release of all causes of action against defendant, O., and his bondsmen on the undertaking given upon obtaining the order of arrest, and was released from imprisonment. The order denying the motion to discharge the order of arrest was reversed, and plaintiff sued upon the undertaking. It appeared that plaintiff was an Italian and could neither read nor speak the

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English language, and that defendant, O., could speak Italian and English fluently, and was an attorney when the release was given. *Held*, that the release was void for duress and plaintiff was entitled to recover. *Lazzarone* v. *Oishei*. 200

3. Plaintiff, an attorney at law, contracted with defendant for the publication of a legal notice for a stipulated period. In an action brought for a breach thereof one of the defenses was that plaintiff was not the real party in interest and had no right to recover any sum from defendant. The evidence disclosed that plaintiff was not known to be acting for any one but himself. On trial the complaint was dismissed. *Held*, error; that the fact that plaintiff was a lawyer had no bearing upon the case; that in contracts made by attorneys, acting as such, they are capable of suing and are liable to be sued in the same manner as other agents or factors. *Gray* v. *Journal of Finance Publishing Co.* 260

4. Defendant rented of plaintiff a sewing machine under a written contract, with privilege of purchase, title to remain with plaintiff until the money agreed upon had been fully paid. By mutual agreement the first machine given to defendant was exchanged for another, whereupon the number of the new machine was inserted in the contract in lieu of the old, without defendant's knowledge. Upon this ground chiefly, the trial justice gave judgment for defendant. *Held*, error; that the alteration was not a material one, as it did not in any way change the terms of the contract. *Domestic Sewing Machine Co.* v. *Barry*. 264

5. In the absence of an agreement by the owner making himself personally liable for the claim of a subcontractor, the latter has a claim against the property no further than the amount unpaid on the contract at the time of filing his lien. *Hutton Bros.* v. *Gordon*. 267

6. The detriment to the promisee which suffices as a consideration for a contract, must be a detriment on entering into the contract, not from the breach of it. *Ridgway* v. *Grace*. 293

7. In pursuance of a contract, defendant L. gave to plaintiff a series of thirty-six promissory notes made by him, and indorsed by the other defendants. Up to April 9, 1892, plaintiff had performed all of the terms of the agreement under which the notes were given, and defendant L. had enjoyed all his rights thereunder. On that day, plaintiff notified defendant L. by letter, that in view of his repeated and continued defaults in payments of some of the notes, he terminated and rescinded the contract, and inclosed the last eleven notes of the series, all of which matured after April ninth, retaining eight notes maturing before that date then outstanding and unpaid. Defendant L. by letter acquiesced in the rescission, and notified plaintiff of his consent that the agreement be wholly rescinded and annulled. In an action on two of the last-mentioned notes, *held*, that plaintiff by the notice of April ninth, meant simply that he terminated the contract only as to its unexpired period. *Hurst* v. *Trow Printing and Bookbinding Co.* 361

8. *Held*, further, that as all the unpaid notes up to the date of the rescission had been fully earned by plaintiff by the performance of the contract on his part, and defendant L. having had all the benefits of the contract up to its rescission, both he and the indorsers were liable thereon. *Id.*

9. An indorser of a promissory note is not released by mere failure to sue the maker. *Id.*

10. Plaintiff, an actress, was employed by defendant under an oral contract in June, 1888, "for thirty five or forty weeks, perhaps a year," services to commence in August, 1888. *Held*, that no obligation was thereby created to continue the employment for a year, and hence the contract was not within the Statute of Frauds

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and was not required to be in writing. *Haines* v. *Thompson.* 385

11. Plaintiff brought action for a breach of contract, and on the trial it appeared that she was discharged upon a previous notice of two weeks. Her complaint alleged that she was employed for the season, commencing on or about August 23, 1888, and ending on or about June 1, 1889, and that she was wrongfully discharged. Defendant testified that at the time of making the contract he said to plaintiff, "You must become engaged here like all the rest of the company, two weeks' notice either side," and further that the phrase "two weeks' notice either side" had a well-known meaning in the theatrical profession. The question "What does it mean?" was excluded on the ground that the right to terminate the employment upon two weeks' notice was not specifically pleaded by the answer, which was a general denial. *Held*, error; that under the defendant's answer he should have been permitted to have given in evidence anything that disproved the allegations of the complaint. *Id.*

12. In an action to recover for breach of contract to accept and pay for a quantity of thermometers manufactured by plaintiffs at defendant's instance, the testimony of defendant's agent tended to establish that at the time of entering into the contract, defendant's agent stated to plaintiffs' agent that defendant desired an advertising medium for the brewing business of novel and original design in that line of business; that plaintiffs' agent represented that plaintiffs had not supplied any brewer with the thermometers; that relying upon the truth of this representation defendant's agent was induced to make the contract on defendant's behalf, and that such representation was false and untrue. Plaintiffs were permitted to introduce evidence from which it appeared that thermometers had for a considerable time before the making of the contract been extensively and notoriously used as an advertising medium in a variety of businesses other than that of a brewer. *Held*, that the evidence was admissible as affecting the credibility of defendant's agent. *Pharo* v. *Beadleston.* 424

13. Plaintiff procured for defendant, the retainer of parties defendant in a foreclosure action for which defendant agreed to give him a certain share of the compensation defendant would receive out of any net surplus arising on the sale in the action. After judgment, a motion by defendant to have the premises sold in parcels having been denied, he procured a stay of the sale, and commenced an action of partition for the same parties whose signatures plaintiff had obtained in the foreclosure suit, retaining defendant. In an action to recover a share of what defendant received in the partition suit, plaintiff had a verdict. *Held*, error; that his complaint should have been dismissed; the agreement with defendant limited any claim by plaintiff to the fee obtained by defendant in the foreclosure suit. *Fogel* v. *Derrickson.* 447

14. Plaintiff's contract of employment with defendant, for five years, stipulated that defendant might terminate it at any time on payment of $2,000, and that upon breach of the agreement by either party, he should forfeit $2,000 to the other as liquidated damages. At the end of two years defendant closed the business and dismantled his factory. In an action to recover the $2,000, *held*, that plaintiff was entitled to recover, and that his obedience of defendant's instructions to shut down and dismantle the factory was not a waiver or release by him of defendant's obligations under the contract. *Hecht* v. *Brandus.* 471

15. Defendant afterwards went into another business and offered plaintiff employment for the remainder of his term of service. *Held*, that plaintiff was not bound to accept it. *Id.*

16. Plaintiff, engaged in the business of breeding and running horses for stakes, brought action

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against defendant, a domestic corporation owning and operating a race track, to recover the amount of the second money in a race called the Futurity of 1891. The complaint among other things alleged that defendant had certain privileges allowed to other similar corporations, and that it discriminated against plaintiff in respect to the allowances of races. The demand for relief was in substance that such discrimination should be stopped. On demurrer to the complaint, *held*, that although the complaint contained a statement of facts sufficient to constitute a cause of action at law for the amount of said second money, there could be no judgment in favor of plaintiff based upon it, as there was no demand for a money judgment and no answer. *Corrigan* v. *Coney Island Jockey Club.* 512

17. Also *held*, that as defendant is a private corporation, it could choose its own customers and do or refuse to do any particular business offered it. *Id.*

18. Also *held*, that the right of defendant to make and register bets and sell pools on the result of its races does not impose upon it the fulfillment of a public duty. The right to register bets and sell pools exists at common law and is only taken away in this state by statute. The prohibition of the statute is merely removed from racing associations during certain periods. *Id.*

See BROKER.
CARRIER.
CONVERSION.
EVIDENCE.
GUARANTY.
LANDLORD AND TENANT.
MARRIED WOMAN.
MASTER AND SERVANT.
MECHANIC'S LIEN.
MORTGAGE.
NEGLIGENCE.
NEW TRIAL.
PATENT.
PLEADING.
REPLEVIN.
SALES.
STATUTE OF FRAUDS.
TRESPASS.
WILL.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

1. The owner of personal property which has been wrongfully converted and retained by the wrongdoer, may waive the tort and sue for and recover its value as upon an implied contract of sale. *Starr Cash Car Co.* v. *Reinhart.* 116

2. In an action for an alleged conversion of personal property an order for the arrest of the defendants was issued and executed. Thereafter judgment was recovered in that action, by default, for dismissal of the complaint with costs. In an action on the undertaking given on arrest, *held*, that the judgment of dismissal in the action of conversion was a final decision that the plaintiff was not entitled to the order of arrest. *Sperry* v. *Hellman.* 414

See DAMAGES.
GOODS SOLD AND DELIVERED.

CORPORATION.

1. In May, 1892, plaintiff recovered judgment against a corporation organized under the Manufacturing Act (Laws 1848, chap. 40), upon its note given for money loaned, and after the return of an execution thereon wholly unsatisfied, brought action against defendants as stockholders. Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and contended that the act of 1848, chapter 40, under which the corporation giving the note was organized, had been repealed by chapter 564 of the Laws of 1890. *Held*, that the act of 1890, was substantially the same as the corporation laws which it was intended to supersede; and that as the repealing clause of the act of 1890 took effect simultaneously with the re-enactment of the statute it did not affect existing corporations except so far as it

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amended or modified the law under which they were incorporated. *Close* v. *Potter*. *Close* v. *Beals*. *Close* v. *Millring*. 1

2. Prior to the creation of a debt against a manufacturing corporation, and while defendant was a stockholder, the provision of law that stock issued for the purchase price of property necessary for the use of the corporation was exempt from liability for the debts of the company, was repealed. Defendant held such stock. *Held*, that at the time the indebtedness arose, defendant's stock was not exempt from its payment. *Close* v. *Noye*. 226

3. The legislature has power to impose a future liability upon a stockholder where before, by express provision of law, he was exempt from liability. *Id*.

4. The charter of a domestic corporation provided among other things that "every director shall be personally liable for all debts incurred by the corporation during his administration to an amount not exceeding $5,000." *Held*, that a director's liability to a creditor thereunder is enforceable in an action at law without joining other creditors or directors; that the prior recovery of a judgment against the company and return of execution issued thereunder, were not essential to the maintenance of the action. *State Bank of Rock Valley* v. *Andrews*. 394

5. While a trustee of a corporation cannot deal with the property thereof, or make a profit out of such dealings without incurring the condemnation of a court of equity, and being called upon to account therefor, it is not a part of his duty as such to advance his personal money to relieve it from financial embarrassment. *Rutgers Female College* v. *Tallman*. 561

See CONTRACT.
EXECUTION.
MORTGAGE.
MALICIOUS PROSECUTION.
NEGLIGENCE.
NEGOTIABLE INSTRUMENT.
PLEADING.

COSTS.

1. The proper sum to be taxed by the prevailing party on a decision of the General Term of this court affirming an order "with costs," is ten dollars and disbursements. *Cassidy* v. *McFarland*. 189

2. On review at General Term of the clerk's taxation of costs, the defendant cannot raise the point that there was insufficient proof before the clerk when the same was supplied at Special Term without objection on his part. *Rieger* v. *Swan*. 467

3. The respondent failed to pay motion costs awarded appellant by a prior General Term. *Held*, that the order should be reversed, with leave to renew upon payment of said costs. *McHugh* v. *Astrophe*. 478

See TRIAL.

COUNTERCLAIM.

See GOODS SOLD AND DELIVERED.

COURT.

See NEGLIGENCE.
PLEADING.
TRIAL.

COURT OF COMMON PLEAS.

See APPEAL.

COVENANTS.

See LANDLORD AND TENANT.

DAMAGES.

In an action for damages for conversion based upon larceny, where defendant is shown to have acted in good faith, the measure of damages is the market value of the property in question. If, however, plaintiff has received to his use any money on account of the value thereof defendant has the right to offset the same in mitigation of damages. *Meeks* v. *Simon*. 241

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——*Rental value of premises.*
See Sternberger v. *Metropolitan Elevated Railway Co.* 113

See MASTER AND SERVANT.
NEGLIGENCE.
SALES.

DECEIT.

See VENDOR AND VENDEE.

DEFAULT.

See CONTRACT.
STATUTE OF FRAUDS.
STATUTE OF LIMITATIONS.

DELIVERY.

See SALES.

DEMURRER.

See PLEADING.

DIRECTOR.

See CORPORATION.

DISTRICT COURTS.

1. Section 2944 of the Code of Civil Proceedure is not applicable to District Courts of the city of New York. *Dows* v. *Morrison.* 54

2. District Courts of the city of New York have no power to set aside verdicts of a jury, and grant new trials. *Schwartz* v. *Wechler.* 67

See SUMMARY PROCEEDINGS.

DIVORCE.

1. In an action for divorce, the husband counterclaimed for a separation; the wife obtained an order awarding her a counsel fee, which on appeal was reversed. Plaintiff gave evidence in opposition to the counterclaim, but her complaint was dismissed on her own case. The husband moved *ex parte* for a restitution of the counsel fee which had been paid. *Held*, that the motion should be denied, as no case for restitution had been made; not against the wife, because she was not a party to the proceeding; not against her attorneys, because in legal contemplation the husband had paid them no money, but if he had, no legal duty rested upon them to restore it. *Grauer* v. *Grauer.* 98

2. A decree of divorce in another state, proceeding only on a constructive service of process by publication, though valid by the law of the forum, is, by the law of New York, a nullity as to defendant spouse resident in New York. *Davis* v. *Davis.* 549

3. A marriage with the plaintiff in such divorce suit, contracted after the divorce, annulled on the ground of the invalidity of the divorce. *Id.*

4. The judgment of divorce, however, cannot be impeached in the action by the second spouse for fraud or error, nor because the divorce was for a cause not recognized in this state. *Id.*

——*Evidence considered and held insufficient to establish the fact of adultery necessary to authorize a decree of divorce.*
See Fanning v. *Fanning.* 90

DOMICILE.

A person may be domiciled in one state and resident of another. His domicile is the place to which he intends eventually to return and there to remain; while his residence is no more than a fixed abode for the time being, as contradistinguished from a place of temporary sojourn. *Eaves Costume Company* v. *Pratt.* 420

See ATTACHMENT.

DOWER.

See BILL OF PARTICULARS.
TRUSTS AND TRUSTEES.
WILL.

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ELECTION OF REMEDIES.

See GOODS SOLD AND DELIVERED.

EMINENT DOMAIN.

See MUNICIPAL CORPORATION.

ESTOPPEL.

See CHATTEL MORTGAGE.
REPLEVIN.
SALES.

EVICTION.

See LANDLORD AND TENANT.

EVIDENCE.

1. A judgment in a criminal action cannot be used in a civil suit to establish the facts on which such judgment rests. *Wilson* v. *Manhattan Railway Co.* 127

2. In an action upon a written instrument purporting to be a contract, parol evidence is admissible to show it does not express the contract between the parties. *O'Leary* v. *McDonough.* 219

3. A hypothetical question is properly excluded, which does not contain all the facts which have been proved at the time the question is put. *Baer* v. *Koch.* 334

4. Where in an action for work done, a party's right to payment depends on the presentation of the certificate of a third party, and it is produced upon the trial in plaintiff's behalf, and defendant alleges that it is untrue and incorrect, with him lies the burden of proof. *Pucci* v. *Barney.* 354

5. The court permitted plaintiff to prove the custom of surveyors in making allowance to excavators where they are required to excavate below the depth mentioned in the contract, in order to reach a level. *Held*, no error. *Id.*

6. Exceptions to the admission of evidence are not available where the ground of the objection is not stated. *Carroll* v. *O'Shea.* 437

7. Upon the question of the value of an attorney's professional services, it is error to read in evidence the opinion of the appellate court affirming a judgment against the client, if objected to; it is also error to incorporate an extract of the opinion into a hypothetical question to be put to an expert witness as to the value of the services. *Crawford* v. *Tyng.* 469

8. No matter what the evidence may be as to the facts, a jury is not required to always find for the plaintiff in cases in which elevated railroad companies are defendants. *Halsted* v. *Manhattan Railway Company.* 498

9. In an action to recover for the value of services rendered by plaintiff for defendants in obtaining for them a contract to erect a house, there was a conflict of evidence both as to the nature and value of the services and of the agreement to pay plaintiff for his introduction of defendants to the owner of the house. The jury found in favor of plaintiff. *Held*, that the court on appeal would not interfere as there was sufficient evidence to justify the verdict. *Riker* v. *Mahoney.* 522

See APPEAL.
BROKER.
CARRIER.
CONTRACT.
LANDLORD AND TENANT.
MASTER AND SERVANT.
NEGLIGENCE.
NEGOTIABLE INSTRUMENT.
NEW TRIAL.
RAILROAD.
SALES.
SUMMARY PROCEEDINGS.
TRIAL.
VERDICT.
WILL.

EXAMINATION BEFORE TRIAL.

1. To entitle a party to a discovery of a paper before trial the party applying must show to the satisfaction of the court that it is in

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writing; that some necessity exists for its inspection, and that its production is essential in the defense of the action. *Bien* v. *Hellman*. 168

2. The granting of an order for the examination of a party before trial, under sections 870, 873, is discretionary. *Wahle* v. *McMillan*. 343

3. Where the plaintiff sues as executor, it is not necessary that his affidavit, upon an application for the examination of a defendant before trial, should state a complete cause of action; if it states the nature of the action and the substance of the judgment demanded, it is sufficient. *Id.*

EXCEPTION.

See APPEAL.

EXECUTION.

1. A sheriff upon execution against a corporation sold whatever right, title and interest it had in certain personal property previously transferred by it in contemplation of insolvency. No levy was made, and the property was not present at the sale and within the view of the purchasers and the sheriff only purposed to sell whatever interest the corporation had therein subsequent to said transfer. *Held*, that the sale was invalid and did not operate as a bar to an action brought by the receiver of the corporation, to set aside the transfer. *Stonebridge* v. *Perkins*. 162

2. In this state, choses in action have never been the subject of levy under execution. *Duffy* v. *Dawson*. 401

See CORPORATION.

EXECUTORS AND ADMINISTRATORS.

1. A gift for life of rents and income of real estate creates an estate therein, and if no duties are charged upon executors with respect to their application, no estate or trust is created in them in respect thereto. *Estate of Goetschius. No.* 1. 278

2. *It seems*, however, that title to and right of custody of personalty, where the contrary is not expressly provided, is primarily in executors for the purpose of protection until final disposition. *Id.*

3. An executor who collects income without authority, renders himself individually liable, and a Surrogate's Court has no jurisdiction to entertain an accounting therefor; and if he invests and uses the personalty to his individual purposes he is chargeable with such interest as the investments earned, as well as profits realized on sale or exchange thereof. *Id.*

4. The amount of the penalty of an administrator's bond is fixed, not with regard to the debts the intestate owed, but the value of his personal estate. *Estate of Govan*. 291

5. On November 17, 1890, a claim against an estate was presented in writing to the administrator who told the person presenting it that he disputed and rejected it, and two days thereafter he signed and left at the plaintiff's house a formal notice in writing disputing and rejecting her claim. Action was commenced May 28, 1891. *Held*, that the action was barred; the Statute of Limitations commenced to run at the time of the verbal notice that the claim was disputed and rejected. *Peters* v. *Stewart*. 357

6. One Y. died in 1867, leaving a will by which he gave to his wife for life, all his estate, real and personal, and after her death he gave the same to his children, one of whom was plaintiff. In an action brought against the widow for a general accounting, plaintiff objected to the item of funeral expenses, the cost of a burial plot and of a monument erected thereon, for the reason that they were not proper charges against the real estate and could not be made a lien thereon. The evidence showed that all of these expenses were as-

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sented to by plaintiff at the time they were made; his objections were overruled. *Held*, proper; that plaintiff should not be allowed to repudiate his consent to the purchases in question, but even if he could, the whole estate, real and personal, is subject thereto if reasonable, as such were found to be by the trial court. *Young* v. *Young*. 381

7. Plaintiff further claimed that those expenses should not have been allowed because the Statute of Limitations ran against them. *Held*, not tenable; the accounting is in regard to trust funds, and in such proceedings the Statute of Limitations are not known. *Id.*

8. Plaintiff also contended that those charges should not have been allowed as against the real estate because there was no order made by the proper court directing such sale. *Held*, not tenable; that from the evidence it appears that the personal property was not sufficient to pay the debts, and inasmuch as all the parties to the action had consented to the sale of the real estate without any order the proceeds of such sale should be so far regarded as personalty as to authorize a court of equity to direct the allowance in question out of such proceeds. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
EXAMINATION BEFORE TRIAL.
SURROGATE'S COURT.
TRIAL.
TRUSTS AND TRUSTEES.
WILL.

EXPERT.

See EVIDENCE.
TRIAL.

FALSE IMPRISONMENT.

In an action for false imprisonment justification must be pleaded, and a denial of knowledge or information whether defendant caused the arrest raises no issue. *Wilson* v. *Manhattan Railway Co.* 127

See RAILROAD.

FALSE REPRESENTATIONS.

See FRAUD.

FORECLOSURE.

See REFERENCE.

FORMER ADJUDICATION.

See JUDGMENT.

FRAUD.

1. In an action in equity to rescind a contract of purchase and sale of personal property, plaintiff's prayer for relief was as follows: "First. That the contract of purchase and sale, made under the false representations and warranty as aforesaid, be rescinded and declared null and void, and defendants be compelled to accept a return of said watches sold and delivered by defendants to plaintiff, under the false representations and warranty as aforesaid, and be compelled to pay to the plaintiff therefor the sum of $10,000, besides the costs and disbursements of this action; second, that in default thereof, defendants be compelled to pay plaintiff his damages in the sum of $15,000, besides the costs and disbursements of this action." There was no tender of the goods to defendants either before or at the trial. On the contrary, it appeared that some of the goods in question had been disposed of by plaintiff. *Semble*, that plaintiff's failure to return the goods, or offer to return them, or put the court in possession thereof, was a bar to his action. *Mason* v. *Wheeler*. 523

2. *Held*, that to entitle plaintiff to succeed on the ground of fraud, which was alleged in the complaint, the representations must be shown to have been made with a knowledge of their falsity, and for the purpose of deceiving him, and that they had that effect; that the burden was upon the plaintiff to establish the truth thereof by a fair preponderance of evidence. *Id.*

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3. It appeared by the complaint that at the time of giving the order for the goods in question defendants represented and warranted to plaintiff that all the goods which plaintiff might purchase of defendants, consisting of watches, should be full eighteen and fourteen-carat respectively, and of the same grade and quality that were sold by one Tiffany. *Held*, that this constituted a warranty as to the character and quality of the goods only, for the breach of which plaintiff had a complete remedy at law. *Id.*

4. Plaintiff claimed that defendants had failed to furnish foreign instead of domestic watch movements, as agreed. Each of the movements was stamped with the name of an American maker, and the bulk of them were delivered before November, 1890. *Held*, that the name of the maker on the movements was immediate notice to plaintiff that they were not foreign, and that he was guilty of *laches* in waiting until February, 1891, to rescind the contract therefor. *Id.*

—— *Without damage will not support an action of deceit.*
See Roome v. *Jennings.* 257

See NEGOTIABLE INSTRUMENT.
NEW TRIAL.

FRAUDULENT CONVEYANCE.

See PLEADING.

GOODS SOLD AND DELIVERED.

1. In an action for the purchase price of goods sold and delivered, the answer did not deny the sale and delivery, nor the price, but alleged and set up as a counterclaim, facts constituting a cause of action for conversion, but claimed, not damages for the conversion, but the specific value of the goods applied by plaintiff to its use and benefit. *Held*, that defendant had elected to treat their cause of action as a claim on contract and that it was a valid counterclaim. *Starr Cash Car Co.* v. *Reinhart.* 116

2. In an action for goods sold and delivered, plaintiff, under objection and exception, was allowed to give evidence of work and labor, and the court charged the jury that "if the goods were not in existence at the time of the purchase, but had to be manufactured, then this case does not come within the Statute of Frauds;" this was excepted to, and no amendment of the complaint was made or moved. *Held*, that a judgment for plaintiff should be reversed for the reason that the admission of the evidence was error, as was also the instruction to the jury. *Shrimpton & Sons (Limited)* v. *Dworsky.* 123

3. Defendant receipted for the goods as "in good order" and "all right," but the uncontradicted evidence was to the effect that the goods were not in fact delivered, but were left on the sidewalk; that he never saw them, refused to receive them, and returned them to the plaintiff's place of business. *Held*, insufficient proof of acceptance to authorize a submission of the issue to the jury. *Id.*

See NEGOTIABLE INSTRUMENT.
SALES.

GUARANTY.

1. Before plaintiffs would deliver lumber to W., who was under contract to build a house for defendant's son, they had a bill of it made out and submitted it to defendant, who approved of it and agreed to see it paid. *Held*, that a subsequent delivery of the lumber to W., was a sufficient consideration for defendant's guaranty. *Hurd* v. *Newbrook.* 88

2. Defendant agreed to pay the bill according to the terms of the contract, which provided that the last payment should be due on the completion. The contractor abandoned the work and it was completed by the owner. *Held*, that on completion of the contract, no matter by whom, defendant became liable. *Id.*

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HAWKERS.

See MUNICIPAL CORPORATION.

HIGHWAYS.

1. The rule with regard to keeping to the right on a public highway, does not apply when there are obstructions on that side of the road. *Quære*, as to whether it applies to any one except drivers of vehicles of some kind. *Mooney* v. *Trow Directory, Printing and Bookbinding Co.* 238

2. A street railroad company has the paramount, not exclusive, right to the use of its tracks. *Lahey* v. *Central Park, etc., R. Co.* 537

HUSBAND AND WIFE.

A husband is not liable for attorney services rendered his wife in proceedings prosecuted by the people against him for nonsupport. *McQuhae* v. *Rey.* 476

INFANCY.

1. Whenever an infant pleads minority to escape payment of the purchase price, the seller may rescind the sale and replevin the goods. *Wheeler & Wilson Manfg. Co.* v. *Jacobs.* 236

2. While an infant must be served personally with the summons, yet before a valid judgment can be obtained against him, a guardian *ad litem* must be appointed. *Id.*

See NEGLIGENCE.
SALES.

INJUNCTION.

See CONTRACT.

INSOLVENT DEBTOR.

See NEGOTIABLE INSTRUMENT.

INSURANCE.

1. B., being indebted to plaintiff to the amount of $40,000, insured his life for that amount for plaintiff's benefit and defendant gave plaintiff his bond in the penalty of $10,000, agreeing in consideration of one dollar, the receipt whereof was acknowledged, to pay the premiums on the said policy as they became due. Defendant made default in the payment of a premium and the policy lapsed. In an action on the bond, after plaintiff had rested, defendant offered to prove, (1) that at the time he made and delivered the bond, the plaintiff orally agreed that if defendant would make and deliver to him such bond, he would forbear to take or avail himself of any legal proceedings against B. for the enforcement of any rights or remedies which he had against him by reason of the said indebtedness or any part thereof, or by reason of any matter relating thereto; (2) that plaintiff agreed to forbear so long as defendant continued to pay the premiums mentioned in the bond; (3) that the agreement stated in said offers was the only consideration given for the bond; (4) that at the time of the delivery of the bond no money consideration was given; (5) that before default was made in the payment of the premiums plaintiff entered judgment by confession against B. for the amount of the said indebtedness. These several offers were rejected, defendant excepted and a verdict for plaintiff for $10,000 was directed. *Held*, no error; (1) the offers tended more to import a new condition into the instrument than to show the consideration thereof; (2) plaintiff was entitled to recover $10,000, the full amount of the penalty of the bond. The court declined to instruct the jury to take into consideration the fact that plaintiff had received a paid-up policy, and, also, declined to charge that plaintiff could recover only the amount of the premiums in default at the time of the enforcement of the action. *Held*, no error. *Gerard* v. *Cowperthwait.* 371

2. In 1887, B. and wife, to secure advances of money by defendant for the benefit of B., assigned

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to him an endowment policy of insurance on B.'s life for the benefit of his wife, issued in August, 1872, for the period of fifteen years. In 1885, B. and wife commenced an action to obtain judgment declaring the assignment void. The judgment in the action, rendered in June, 1887, directed a redelivery of the policy to B.'s wife. The husband survived the period of fifteen years. *Held*, that the interest of the wife in the policy having ceased before judgment, the same should be modified by striking out the direction that defendant deliver the policy to her. *Miller* v. *Campbell*. 518

INTEREST.

See MISTAKE.
TRUSTS AND TRUSTEES.

INTERPLEADER.

1. The granting of an order of interpleader is discretionary, and unless it clearly appears that the discretion has been improperly exercised, an order denying a motion therefor should not be disturbed. *Taylor* v. *Satterthwaite*. 441

2. The owner of real estate having been sued by a broker for commissions for effecting a sale thereof, and also by another party for work, labor and services in the sale of the same property, applied for an order of interpleader under section 820 of the Code of Civil Procedure, which was refused upon the ground that both claimants were demanding the same debt. *Held*, that the granting of the order being discretionary its denial must stand. *Id.*

3. *Held*, further, that both claims, though arising from the same subject-matter, were in no sense conflicting. *Id.*

INTERROGATORIES.

See TRIAL.

INTERVENOR.

See PARTIES.

JUDGMENT.

1. A judgment for rent pending an appeal with an undertaking effectual as a stay, does not prevent a valid demand of the rent, and a default in its payment opposes no bar to a summary proceeding to dispossess the tenant for nonpayment of the rent for which the landlord has the judgment. *Durant Land Improvement Co.* v. *Thomson Houston Electric Co.* 180

2. A judgment for goods sold and delivered, until vacated and the action discontinued, is a bar to an action for deceit in contracting the liability for the purchase price. *Lee* v. *Corn*. 463

—— *In criminal action used in civil action.*
See Wilson v. *Manhattan Railway Co.* 127

—— *Resting on testimony of false witness when reversed as without evidence.*
See Morgenthau v. *Walker*. 245

See ASSOCIATION.
CONVERSION.
CORPORATION.
DIVORCE.
INSURANCE.
MECHANIC'S LIEN.
MUNICIPAL COURT OF BUFFALO.
PATENT.
SALES.

JUDGMENT CREDITOR.

See SUPPLEMENTARY PROCEEDINGS.

JURISDICTION.

See MUNICIPAL COURT OF BUFFALO.
NEGLIGENCE.
NEGOTIABLE INSTRUMENT.
SURROGATE'S COURT.

JURY.

See APPEAL.
EVIDENCE.
MASTER AND SERVANT.
NEGLIGENCE.
WILL.

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JUSTICE'S COURT.

See APPEAL.

LANDLORD AND TENANT.

1. In an action for four months' rent tried before a referee, he found that defendant made an arrangement in the latter part of April with F., plaintiff's agent, to rent the premises from month to month subject to plaintiff's approval, and refused to find that defendant communicated the arrangement to plaintiff or that she assented thereto. The evidence of plaintiffs was to the effect, that in a conversation with her a few weeks prior to May first, defendant's wife had stated that they would like to retain the house at least six months longer; plaintiff said, that she was anxious to sell the house, but that if it was not sold they could stay. She also testified that before the conversation with defendant's wife she had written a letter to O., a former agent, who had refused as defendant testified to let him have the house for six months, in which she stated that defendant's wife had called the day before and said that they would not care to take the house for a year but would do so for six months if she would let them. This letter bore date March nineteenth. *Taylor* v. *Kirkover*. 42

2. One of plaintiff's daughters testified that the conversation between her mother and defendant's wife took place in the spring; her other daughter, that it took place in February or March. *Held*, that a finding of the referee that before May first, a contract of rental was made for six months, was against the weight of evidence, as the testimony showed that plaintiff understood that she had not leased, and defendant understood that he had not rented. *Id.*

3. In an action for rent, it appeared that the premises demised was part of a building which comprised several distinct tenements so constructed that each was substantially dependent for comfortable inhabitation during the colder season upon a furnace and boiler situated in the cellar, from which steam heat was distributed by conduits to the several tenements; that of this furnace and boiler the landlord had reserved exclusive control. Plaintiff's lease was in writing, and contained the ordinary covenants. The landlord did not bind himself to supply any heat whatever. *Held*, that the landlord was bound to furnish an adequate supply of heat notwithstanding the absence of any provision to that effect in the lease, and a failure on his part to do so substantially deprived the tenant of the beneficial enjoyment of the premises which was sufficient to allow him to abandon the premises and interpose a defense of eviction. *Ryan* v. *Jones*. 65

4. In order to justify such an abandonment, the deprivation of such heat must be continued at the time thereof. *Id.*

See SUMMARY PROCEEDINGS.

LATERAL SUPPORT.

See NEGLIGENCE.
TRESPASS.

LEASE.

See MORTGAGE.

LEGACY.

See WILL.

LEGISLATURE.

See CORPORATION.

LIEN.

See CHATTEL MORTGAGE.

LOST INSTRUMENTS.

See SPECIFIC PERFORMANCE.

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MALICIOUS PROSECUTION.

1. Plaintiff, for many years defendant's treasurer and manager, authorized to use its name for the indorsement of commercial paper, and having the general conduct of its business affairs, in accordance with defendant's constant practice and with the knowledge of its board of directors, indorsed defendant's name upon the note of a corporation customer of defendants. While such note was outstanding and unpaid, plaintiff resigned as treasurer and manager. His successor, W., ascertaining the fact of defendant's liability as indorser of said note, instructed counsel to prosecute plaintiff for damages for the alleged unauthorized use of defendant's name. Thereafter, in an interview, plaintiff fully explained to W., in detail, all the circumstances attending his indorsement of said note and also repeated the explanation in W.'s presence at a subsequent meeting of defendant's board of directors which he attended at W.'s request. Plaintiff declining to secure defendant against its contingent liability on the note, by a conveyance of his property, the board of directors authorized W. to proceed with the action against plaintiff and to attach his property, he being a nonresident of the state, which was done. Plaintiff in that suit had judgment on the ground that he was authorized to indorse the note and the Court of Appeals affirmed the same. In an action for malicious prosecution, *held*, that the action against plaintiff, and the attachment of his property was without probable cause and malicious. *Willard* v. *Holmes, Booth & Haydens.* 303

2. Advice of counsel is no defense to an action for malicious prosecution where it does not appear that the advice was obtained after a full, fair and honest statement of all the facts. *Id.*

3. Plaintiff had a verdict for $31,700. *Held*, that as the record did not show that the jury were actuated other than from conscientious motives and a proper discharge of duty, or that their deliberation was warped by undue sympathy for plaintiff, passion or prejudice against defendant, their estimate of plaintiff's damages was conclusive. *Id.*

MANDAMUS.

See MUNICIPAL CORPORATION.
SUMMARY PROCEEDINGS.

MARKETS.

See MUNICIPAL CORPORATION.

MARRIED WOMAN.

1. In an action brought by plaintiff against defendant, a married woman, for work done in a flat in which she resided with her husband, it appeared that a written estimate for the work was made out in defendant's name and sent to her by mail. Plaintiff knew that defendant was a married woman, and in one of the interviews with her had been told that she had submitted the estimate to her husband, who thought it was too high. There was other testimony showing that plaintiff knew defendant's husband was living. After the work had been finished and payment therefor demanded on several occasions of defendant, plaintiff accepted a promissory note made by defendant's husband for the full amount of the bill, which was thereafter sued upon and put in judgment. On the trial hereof plaintiff was nonsuited. *Held*, proper; that plaintiff's judgment against defendant's husband was conclusive evidence that he looked to him as the principal debtor. *Lugar* v. *Swayze.* 409

2. Also *held*, that plaintiff's contention that they ought not to be concluded by that judgment, as the action was based upon the promissory note and not upon the original claim, is not tenable, for the reason that the original claim was the only consideration for the giving of the note, and without such consideration the note would have been void as between the parties. *Id.*

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8. Also *held*, that under the plea of *nil debet*, any fact tending to show there was no indebtedness on the part of defendants, was admissible. *Id.*

MASTER AND SERVANT.

1. Plaintiff and a fellow-workman were directed by their and defendant's foreman to remove the center plates from an unfinished platform car. Each without aid or consultation with the other obtained a jack and placed it under an end of the car. Plaintiff had never used a jack before. After the platform was raised from four to six inches above the trucks, but not high enough to have the center pin clear the plates, plaintiff looked at both jacks which appeared secure and then went under the car to raise the center pin, and while there, and before he could escape, was injured by the car falling. As the car fell it swerved, and gave way where the fellow-workman's jack was placed. This jack was not a sound and safe tool, for the purpose required. *Held*, that as from all the evidence and the circumstances a jury would be warranted in drawing the inference, that the falling of the car was due to the defective jack, a nonsuit was error. *Williams* v. *New York, etc., R. Co.* 30

2. Plaintiff's act in going under the car simply to raise the center pin, was not in the circumstances so apparently dangerous as to be negligence *per se*. *Id.*

3. A witness testified that before and after plaintiff was injured, he had informed the foreman that the jacks were not fit for use. *Held*, that whether defendant had notice of their condition was for the jury. *Id.*

4. Whether the fellow-workman ought to have or did discover the defect in the jack, *i. e.*, that the nut was worn, it was alone his negligence, and defendant was still negligent in furnishing an unsound tool, and the accident being occasioned by the concurrent negligence of the master and a fellow-servant, the master was not excused. *Id.*

5. Plaintiff's intestate with knowledge that a certain track in defendant's yard, where he was employed as a car repairer, was used exclusively for storing crippled cars awaiting repairs, went under a car on said track and while disconnecting a spring required by him, another car was shunted against the one from which he was taking the spring with such violence as to force it over his body, causing injuries. *Held*, that defendant was not liable. *Keenan* v. *New York, etc., R. Co.* 34

6. The fact that plaintiff's intestate was directed to go where he did by a foreman, cannot avail in the absence of evidence justifying a conclusion, that the foreman had authority to change the regulations of defendant as to where plaintiff's intestate should work. *Id.*

7. Whether a servant may by contract exonerate his master from liability for an injury inflicted by the latter's own negligence, *quære*. *Runt* v. *Herring*. 105

8. Plaintiff, in consideration of his employment by defendants, agreed "that in the event of his receiving any personal injury, accidental or otherwise, not to make any claim for money damages or institute or appear as a witness in any suit or proceeding," nor to "countenance or authorize any person to sue or appear and give testimony in any suit claiming damages for injuries." In an action to recover for injuries received by defendants' negligent omission to provide plaintiff a safe working place, the agreement was received in evidence. *Held*, that the agreement was against public policy and void, and its reception in evidence under objection error. *Id.*

9. Defendants contended that plaintiff's stipulation to forego his claim against the defendants might be held valid and operative, although his engagement not to sue or give testimony in the courts might be illegal and

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ineffectual. *Held*, that the contention was untenable; the agreement being void in part was void as a whole. *Id.*

10. A servant wrongfully discharged at a season when persons in his line were not usually employed, and unable to obtain employment, went into business for himself. In an action to recover damages for his discharge, the trial justice instructed the jury that if they found in plaintiff's favor, defendant was entitled to be credited with the amount of the actual profits earned by plaintiff in his business during the stipulated period of service with defendant, and not with the value of plaintiff's services. *Held*, correct. *Toplitz* v. *Ullman*. 130

11. In an action to recover wages, plaintiff was charged by defendant with tampering with the cash register so as to defraud defendant of the receipts. It appeared that the register had been opened and that others had access to the register equally with the plaintiff. The court charged that the jury must find that plaintiff took any goods corruptly and wrongfully. *Held*, no error. *Dunn* v. *Ultsch*. 211

12. The court charged, on request, that there was no evidence that would justify a finding that plaintiff took any money wrongfully. *Held*, no error; that as the charge of the court did not accompany the return it could not be said with the request standing alone, that it was not modified by the court in its charge to the jury. *Id.*

13. Defendant after testifying that he had never found any mistake made by the cash register, was asked "whether it was an accurate machine?" The court refused to allow him to answer. *Held*, no error; his opinion was incompetent. *Id.*

14. A contract of employment provided that either party might cancel the agreement by giving two weeks' notice to the other. *Held*, that on a discharge without notice, plaintiff was entitled to two weeks' salary as damages. *Fisher* v. *Monroe*. 326

15. When plaintiff, who was at work on an elevator, had got a truck containing a heavy case of goods half off the elevator, a chain running through the elevator was shaken by a fellow-servant, which action plaintiff knew was meant to obtain an answer whether the elevator was in use. He was not sure that he answered the signal as was the custom; the platform went down about two feet; the truck tipped; the case of goods fell against plaintiff; he made a loud noise, and the platform was raised so as to be level with the floor. In an action to recover for injuries received, *held*, that as it appeared that plaintiff understood the working of the elevator and in particular the liability of a premature going down of the same, and continued in the service after knowledge thereof, he assumed all risks of what he saw and understood. *Held*, further, that if the negligence of his fellow-servant in the management of the elevator caused the accident plaintiff could not recover. *Beyer* v. *Victor*. 496

MECHANIC'S LIEN.

1. The Mechanics' Lien Law (Chap. 342, Laws of 1885) being in derogation of the common law, its provisions must be strictly complied with. A lien not filed within ninety days after the completion of a contract or final performance of the work is, therefore, absolutely void. *McMahon* v. *Hodge*. 234

2. In an action to foreclose a municipal mechanic's lien and to determine the amount and precedence of several claims against the city of New York, under a contract with one D., the only question in litigation was to whom, in what order and amounts the money due D. from the city should be paid. On the trial, the referee allowed an amendment to D.'s answer which authorized a

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recovery by him against the city for extra work. This was at a hearing which the legal representative of the city did not attend, it being, as he and others supposed, though erroneously, for the purpose of summing up a matter which, on the then state of the pleadings, was of no concern to his client. From the judgment entered thereon by D. against the city the latter appealed, and on its motion an order was entered opening the judgment, permitting the city to oppose the motion to annul and, if need be, to resist D.'s claim for extra work. *Held*, that the order was a discretionary one and properly granted. *Fortunato* v. *Mayor, etc., New York.* 406

3. A notice of mechanic's lien was verified in Milwaukee, state of Wisconsin, before a commissioner for the state of New York, and filed in the New York county clerk's office without having attached thereto the certificate of the secretary of state that the person taking the verification was a commissioner for the state of New York. After the commencement of an action to foreclose the lien, it was taken from the files of the county clerk's office and the said certificate attached. *Held*, that the notice was insufficient to create a lien. *Cream City Furniture Co.* v. *Squier.* 438

—— *Provisions of Mechanics' Lien Law to be strictly complied with. See McMahon* v. *Hodge.* 234

See CONTRACT.
PARTIES.
REFERENCE.

MISTAKE.

Plaintiff and E. contracted for the purchase of certain premises, assuming a mortgage thereon. There was some interest due on the mortgage. Plaintiff furnished the money to consummate the contract, and by mistake paid the interest to defendant and was obliged to pay the mortgagee the amount of said interest. After the purchase plaintiff acquired all of E.'s interest in the property, and demanded of defendant a return of the interest money, which was refused. In an action to recover the money, plaintiff was nonsuited on the ground of a defect of parties. *Held*, error; that the matter being independent of the real estate transaction, plaintiff alone was entitled to the money. *Eckert* v. *Leunert.* 198

MORTGAGE.

1. A mortgage, whether it be regarded as an estate in, or only a lien upon premises, operates as a transfer of the reversion after the mortgagor's default and foreclosure, to which the enjoyment of the rent is but an incident, and its record is notice of the fact to a lessee. *Hartley* v. *Meyer.* 56

2. A corporation owning premises, mortgaged the same, and subsequent thereto, April 1, 1891, leased a portion thereof to its manager. After the execution of the lease, the corporation became indebted to the tenant, its manager, and his wife, for money loaned, and the president and the manager, claiming to act under authority, entered into an arrangement whereby the unmatured rent reserved, was appropriated and applied in extinguishment of the indebtedness. Thereafter, the mortgage was foreclosed, and the manager-tenant, who was an obligor under a junior mortgage, was made a party defendant, and on the sale the property was bought in by plaintiff. The conveyance thereof to him, was "subject to all valid leases of said premises made prior to the 12th day of October, 1891." Defendant defaulted in the payment of a month's rent, and summary proceedings to recover possession were begun. On the trial defendant urged the arrangement with the mortgagor, it being conceded that the month's rent was not otherwise paid. The trial court held that the evidence was insufficient to establish the authority of the president and manager of the mortgagor to enter into the arrangement in question, and directed an order awarding

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possession of the premises to the purchaser on the foreclosure sale. On appeal from that order, *held*, that the authority of the officers of the mortgagor, to make the arrangement mentioned, and the right of the purchaser on the foreclosure to attack such authority, was immaterial; that the mortgagor's officers could not conclude the mortgagee from any rights which he, or the successors of his interest, might have to the enjoyment of future accruing rents, without his or his successor's assent. *Id.*

3. Mortgages for future advances on the same property, each containing a provision for allowing the mortgagee to discontinue his advances at his option will prevail over supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgages, whether made before or after the claim of such purchaser or creditor arose, or before or after the mortgagee had notice thereof. *Hyman* v. *Hauff.* 388

4. No one but parties to a contract can take advantage of a breach of its condition, and the rights and liabilities are confined to them and their privies. *Id.*

5. Parties to a mortgage may by agreement extend payment without losing priority over inferior lienors. *Id.*

See MISTAKE.
SALES.

MUNICIPAL CORPORATION.

1. After the confirmation of an award made in proceedings to appraise the damage to relator's property occasioned by a local improvement, and before the defendant's common council had audited the claim, the statute under which the award was made was repealed and audit refused. The charter of Buffalo provides that "the common council shall audit all claims against the city of Buffalo." *Held*, that the award was a liquidated claim against the city of Buffalo, and that the remedy by mandamus to enforce its payment was proper. *People ex rel. Reynolds* v. *Common Council of the City of Buffalo.* 7

2. A municipal charter authorized its common council to license and regulate hawkers, peddlers, etc., and to regulate the sale of meats, fish and vegetables. *Held*, that an ordinance prohibiting the peddling of fruit, garden or farm products in the public streets between five o'clock in the morning and one o'clock in the afternoon was valid. *City of Buffalo* v. *Schleifer.* 216

MUNICIPAL COURT OF BUFFALO.

1. The summons and verified complaint in an action brought in the Municipal Court of Buffalo upon an undertaking given upon obtaining an order of arrest must be served by a duly appointed constable or such other person as may be duly deputized by the court. If otherwise served, the court acquires no jurisdiction over the persons of the defendants, and can render no valid judgment. *Lazzarone* v. *Oishei.* 200

2. Objection to the jurisdiction of the court on the ground that the service of the summons and complaint was insufficient, is not waived by proceeding with the case. *Id.*

3. Where the original verified complaint filed in an action brought in the Municipal Court of Buffalo demands judgment for a greater sum than does the copy of the complaint served on the defendant, who appears and defends, plaintiff upon proof, is entitled to a judgment for the amount demanded in the original complaint. *Jackson* v. *Hovey.* 208

NEGLIGENCE.

1. In an action to recover for injuries received by being struck by a passing railroad train at a street crossing, the evidence for plaintiff tended to show that the train was

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being run at a rapid rate of speed; that no warning of any kind was given of the approach of the train; that the crossing was in a populous part of a city which was much traveled and that the night was quite dark. Plaintiff and his companion were in a one horse carriage the sides of which were closed with curtains somewhat obstructing their view in those directions. At the crossing, which they approached from the east, there were five tracks, the two westerly ones belonging to defendant; and as they approached the first track going west they stopped their horse, looked up and down the tracks and seeing nothing to prevent their crossing the remaining tracks in safety, made haste to cross and were struck and injured on the last track of defendant's road by a passing train. It also appeared, that the view to the north along the tracks for a long distance from a point about 150 feet east of them was unobstructed except as to an electric light near the crossing which it was claimed might have affected the view to some extent, and it was from that direction that the train came which caused the injury to plaintiff. *Held*, that whether defendant exercised due care in the running of the train was properly submitted to the jury. *Moore* v. *New York Central, etc., R. Co.* 23

2. Defendant proved that no flagman or other person to give warning was kept at the crossing. *Held*, that it could not complain of a charge that the absence of such a person was a circumstance which the jury might consider in determining whether or not defendant operates the train with due care. *Id.*

3. While the duty of one crossing a railroad track to look and listen is a continuous one, he is bound to exercise ordinary sense, prudence and capacity and to use his eyes and ears so far as he has opportunity; the circumstances and actual condition of things at the time must be considered in measuring the opportunity. *Id.*

4. In an action to recover for personal injuries, the evidence showed that just as plaintiff, a boy six years old, stepped upon a crosswalk to go to the other side of the street, defendant's team swerved, and, though plaintiff tried to recover himself and get back upon the sidewalk, the horses struck him and the wheel went over him, doing serious bodily harm. The driver at the time, was looking behind the wagon or sideways and could not have seen the plaintiff. The trial judge dismissed the complaint upon the ground of absence of negligence on the part of the defendant and of proof connecting defendant with the acts charged, and also on the ground of contributory negligence. *Held*, error; that the negligence of defendant and the absence of contributory negligence of plaintiff might be inferred from the evidence, and the case should have been submitted to the jury. *Elze* v. *Baumann.* 72

5. Plaintiff by guardian sued to recover damages for injuries sustained by being run over by one of defendant's cars. At the time of the accident plaintiff, then four years of age, was playing with other boys in the street. The proof established that there was no neglect whatever upon the part of the driver and the circumstances indicated nothing from which it could be inferred. *Held*, that a dismissal of the complaint by the trial court was proper. *Jaquinto* v. *Broadway and Seventh Ave. R. Co.* 174

6. *Held*, also, that in such a case where the facts are as consistent with due care on the part of a driver as with negligence, a plaintiff is properly nonsuited. *Id.*

7. Defendants V., contractors for the erection of a building, agreed to become answerable for any damages to the property or person of any neighbor during the performance of the work. A subcontractor to blast rock and excavate earth assumed all responsibility for any loss or damage which might occur to person or property while he or his employees were engaged in the performance of such work, and agreed to save the contractors harm-

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less from the payment of any such loss. Eighteen holes were drilled for blasting purposes, and when the blast was let off, considerable damage was thereby occasioned to plaintiff's building. Further damage was done to plaintiff's property by a continuance of the blasting. In an action against the contractors and subcontractor to recover damages, the complaint alleged that the damage was done by reason of the negligent manner in which the rock was blasted. The trial court withdrew the question of negligence from the jury and held the defendant contractors were liable under their contract with the owner, without any proof of negligence. *Held*, error; that the work of blasting not being dangerous in itself, and the damage arising therefrom being the result of the negligent manner in which the work was performed by the subcontractor, who had exclusive control thereof, the contractors were not liable. *French* v. *Vix*. 312

8. Proof that defendant's wagon, by which plaintiff was injured, was being driven fast, is not alone sufficient to support a finding of negligence on the part of the defendant, unless it was at a rate of speed forbidden by law. *Keck* v. *Sandford, Prest., etc.* 484

9. In the trial of an action to recover damages for injuries resulting from the alleged negligence of defendant's servants, the court refused to allow in evidence the entry in a police blotter as to statements made by plaintiff on the day of the accident to witness M. *Held*, proper; it was not admissible as proof of what the plaintiff said, for it was not the best evidence; it was not admissible to contradict M., as his attention had not been called to the statements therein, and it was not admissible to corroborate M., because it would be hearsay. *Weymouth* v. *Broadway and Seventh Ave. R. Co.* 506

10. The court refused to charge defendant's request "that proof having been given that the notice required by the General Railroad Act was posted in the car in which the accident to plaintiff happened, and that plaintiff was riding upon the front platform and was upon the step of the car when injured," etc. *Held*, no error; as defendant had not pleaded the facts which would entitle it to the exemption which it claims that the act in question allows. *Id.*

11. In an action for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant's servants, it appeared that at the time the injuries complained of were received and at the date of the bringing of the action, the plaintiff was a resident of Brooklyn, the defendant a foreign corporation and that the cause of action accrued in the state of New Jersey. *Held*, that this court had jurisdiction as to both subject-matter and parties. *Flynn* v. *Central Railroad Company of New Jersey*. 508

12. One who temporarily obstructs the tracks of a street railway when necessarily engaged in the prosecution of a lawful business, and is injured by the negligence of the railway company, may maintain an action for damages if he himself is without fault. *Lahey* v. *Central Park, etc., R. Co.* 537

13. Plaintiff was engaged with other workmen in the employ of a city in laying water pipes near defendant's railway track. One of the workmen had necessarily placed the hub end of a pipe against the track when one of defendant's cars came along at the rate of six miles an hour, and the step struck the hub end of the pipe, which whirled around and struck and injured plaintiff who was standing with his back to the car. A watchman had been placed by defendant at this point to see that no obstacles were in the way, but at the time of the accident he was absent. *Held*, that the jury were warranted in concluding that plaintiff was free from contributory negligence and that the driver was guilty of negligence. *Id.*

14. Plaintiff's intestate, a child between five and six years of age,

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was sitting on a curbstone with her feet in the gutter; on the approach of defendant's wagon, she ran towards the other side of the street but was knocked down by the horse, and received injuries from which she died. The court stated the law on the rights of infants *sui juris* and *non sui juris*, and charged that "the child had a perfect right to be in the street there, and that the parents were not guilty of negligence in allowing it to be there." Defendants did not object to the charge or to any part of it on the same subject. The question whether the plaintiff, in case the infant was *non sui juris*, was bound to show that there was no negligence of the parents, was not called to the attention of the court. *Finkelstein* v. *Crane.* 545

15. At the close of plaintiff's case a motion to dismiss on the ground that there was no negligence on the part of defendants, and that the child was where it was unreasonable to expect a child of her age to be, was denied. *Held*, no error; that if it referred to a want of negligence of defendant's driver because he had no reason to expect that a child should be where the intestate was at the time of the accident, and that were so, plaintiff had a right to ask a verdict; that the driver saw the child while she was in peril and might by proper management have prevented the accident. If it referred to negligence for which the child was responsible, it singled out a fact not of itself decisive. *Id.*

See CARRIER.
MASTER AND SERVANT.
TRESPASS.

NEGOTIABLE INSTRUMENT.

1. The City Court of New York has jurisdiction of an action brought by a foreign corporation against a domestic corporation upon a negotiable instrument, although the cause of action did not arise in the city of New York, and neither of the parties resided there, nor was the summons served therein. *Globe Yarn Mills* v. *Bilbrough.* 100

2. In an action by a foreign corporation upon a promissory note given for goods sold and delivered, one H., who obtained the note from plaintiff's treasurer, to whose order it was payable, and upon H.'s affidavit that the plaintiff was entitled to recover the amount of the note, with interest thereon, over and above all counterclaims and offsets known to the plaintiff or deponent, an attachment was obtained. *Held*, that the affidavit was sufficient. *Id.*

3. In a proper case, a deposit in the post-office of a notice of dishonor, though accompanied with a direction to return if not delivered in ten days, is sufficient notice to charge an indorser. *Manchester* v. *Van Brunt.* 228

4. Defendant, being insolvent, entered into a composition deed with plaintiff and other creditors, whereby they accepted in full satisfaction twenty-five per cent of their respective claims payable by his promissory note. The notes which plaintiff was entitled to under the agreement were three in number, each one being for $175.76. Plaintiff, however, would not sign off unless it received an additional note of $500, which, unknown to the other creditors, defendant gave. One of the three notes first above mentioned was paid, and this action was brought to recover upon the other two together with the $500 note. The trial justice directed a verdict for plaintiff for the full amount. *Held*, error; that as plaintiff received a money benefit not accorded to the balance of defendant's creditors, its dealings were unconscionable, such as the law stamps as fraudulent, and not only vitiated the $500 note, but also the other two. *The Bradley and Currier Co. (Limited)* v. *Lally.* 285

5. *Held*, further, that upon the testimony a verdict should have been directed for the defendant. *Id.*

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6. The holder of a promissory note cannot recover against the indorser when he does not prove that notice of dishonor was given to the defendant, and seeks to bring himself within the statutory exceptions, unless he alleges and proves the facts necessary to constitute the exception. *Clark* v. *Tryon.* 457

7. In an action against an indorser of a promissory note, the complaint alleged due notice of demand of nonpayment and protest was given defendant. The answer denied the allegations. *Held*, that evidence to prove excuse for failure to protest, was inadmissible, in the absence of an averment of that character in the complaint. *Id.*

See CONTRACT.
CORPORATION.
MARRIED WOMAN.
REPLEVIN.

NEW TRIAL.

1. Fraud avoids all contracts, and when properly pleaded, evidence thereof should be admitted. The exclusion of such evidence is error, for which a new trial will be granted. *Manning* v. *Maas.* 266

2. An exception to the denial of a motion for a new trial is ineffectual for any purpose where the case contains no order denying defendant's motion, on the minutes, for a new trial. *Carroll* v. *O'Shea.* 437

3. No appeal lies to the General Term of this court from an order of the City Court refusing a new trial. *Id.*

4. It is settled law that if a party against whom a verdict is rendered on conflicting evidence neglects to request the court to direct a verdict, his motion for a new trial on the minutes, either on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will be denied. *Halsted* v. *Manhattan Railway Company.* 498

5. Where there is no conflict of evidence, the question whether it is sufficient to sustain the verdict may, without such request, be considered where a new trial on the minutes is asked for on the ground that the verdict is against law. *Id.*

6. Where, from defect in the moving papers, it cannot be seen that justice will be promoted, a motion for a new trial on the ground of surprise will be denied. *Leonard* v. *Germania Fire Ins. Co.* 548

7. Where a plaintiff answers ready and proceeds with the trial in the expectation that an absent witness will arrive in time, he takes the chance of the witness' nonattendance, and cannot urge surprise as the ground of a motion for a new trial, especially when by the dismissal of his own complaint, he may sue again. *Id.*

—— *District court no power to grant.*
See Schwartz v. *Wechler.* 67

See APPEAL.
RAILROAD.
TRIAL.
WILL.

NONSUIT.

See MASTER AND SERVANT.
TRIAL.

NOTICE.

—— *Of dishonor to indorser.*
See Manchester v. *Van Brunt.* 228

—— *Of mechanic's lien, when void.*
See McMahon v. *Hodge.* 234

See CONTRACT.
EXECUTORS AND ADMINISTRATORS.
MORTGAGE.

ORDER.

See BILL OF PARTICULARS.
TRIAL.

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ORDER OF ARREST.

See CONTRACT.
CONVERSION.
SALES.
UNDERTAKING.

ORDINANCE.

See MUNICIPAL CORPORATION.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

1. Upon an application by indemnitors of a sheriff to be substituted as defendants in an action against him to recover property levied upon by him, it appeared that before any application for substitution, judgment by default had gone against the sheriff without the knowledge of the indemnitors. The answer of the latter disclosed on the application, showed a valid defense, and no objection was made by plaintiff as to their sufficiency to respond in damages. *Held*, that the granting of an order of substitution was an exercise of a fair discretion by the court below. That in common justice the indemnitors should have their day in court to make good their defense, especially as the default of the sheriff in answering was wilful. *Jakobi* v. *Gorman.* 190

2. Indemnitors in an action of this kind are the real parties in interest and the law allows them to intervene for the protection of their rights. *Id.*

3. Owners, grantors or assignors of premises prior to the filing of a mechanic's lien, are neither proper or necessary parties to foreclosure proceedings. *Southard* v. *Moss.* 121

See CONTRACT.

PARTNERSHIP.

See SALES.
PLEADING.

PATENT.

1. Plaintiff's complaint was framed upon the theory that he was entitled to recover the reasonable value of a license to use a patented process. He had a verdict upon proof of an agreement between him and defendants that he, as superintendent of their factory, was to use the patented process in defendants' business for a reasonable compensation over and above his salary. The evidence to prove plaintiff's case was admitted without objection that it varied from the complaint. *Held*, that after the close of the testimony on both sides, it was too late to raise the point. *Montgomery* v. *Waterbury.* 145

2. *Held*, further, that the variance between the proof and the allegations of the complaint were not sufficient to reverse the judgment. *Id.*

3. In an action to recover compensation for the use of a patented process, the licensee cannot set up the invalidity of the patent. *Id.*

4. Under a contract, defendants had paid plaintiff for the use of his patents ten per cent of the value of the gain in the weight of the goods manufactured. At the end of the term of the contract, he was told by one of defendants' firm to go on and that a satisfactory arrangement would be made with him for the use of his patents. Plaintiff went on, used his patents, and all subsequent efforts to get at a fixed basis of compensation failing, left defendants' employ. *Held*, that the actual gain in weight during the period in controversy furnished the best basis for computing the reasonable value of the use of plaintiff's processes, and proof as to the validity or invalidity of his patents was immaterial. *Id.*

PATENTED PROCESS.

See PATENT.

PAYMENT.

See CORPORATION.

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PEDDLERS.

See MUNICIPAL CORPORATION.

PENAL CODE.

§ 171a *Curran* v. *Galen.* 553

PENALTY.

See EXECUTORS AND ADMINISTRATORS.

PERSONAL PROPERTY.

See CONVERSION.

PLEADING.

1. The complaint alleged that plaintiff contributed $10,000 towards securing a franchise for the defendant corporation upon the agreement with defendants that he should receive the same amount of money and stock as the original promoters. He, in fact, received $10,000 in the stock of the company and a writing stating that he was entitled to $10,000 of first mortgage bonds of another corporation. There was no allegation that the original promoters received any stock or money over and above what plaintiff had received, or that they had received anything at all. No allegation of a breach by defendants, or either of them, of the agreement sued on was alleged, nor was there any allegation that what plaintiff received was not equal to whatever the original promoters received. *Held*, on demurrer, that the complaint failed to state a cause of action. *DeLacy* v. *Walcott.* 132

2. A complaint demanding judgment that certain deeds be declared fraudulent and void as against plaintiffs; that one of the defendants be adjudged liable to surrender possession; that all others claiming under him be forever barred from all claim; that the premises be partitioned according to the respective rights of the parties, etc., is for equitable relief such as cannot be granted at a jury term. If there are issues involved as to which plaintiff may claim a trial by jury, he must have them settled and stated for trial accordingly. *Hayes* v. *Kerr.* 164

3. In an action for money "loaned and advanced" the defendants, a copartnership firm, the answer admitted the partnership and denied the other allegations of the complaint. A verdict having been rendered for plaintiffs, defendants appealed and contended that the money was borrowed by their agent for an illegal purpose. *Held*, that such a defense was in the nature of new matter, avoiding a contract, and should have been pleaded. *De Bautte* v. *Curiel.* 170

4. A denial of a material allegation of the complaint, whether general or specific, may not be stricken out as sham. *Ziri* v. *Einstein.* 177

5. An averment of lack of knowledge or information sufficient to form a belief as to such allegation, is such a denial as prevents striking out the answer as sham. *Id.*

6. In replevin in the *detinet* a general denial puts in issue the plaintiff's title to the property and his right of possession. *Haas* v. *Altieri.* 252

7. A complaint on a note must allege nonpayment; but the absence of the averment will be supplied by unchallenged proof of the fact. *Wright* v. *Deering.* 296

8. The granting of a motion to strike out scandalous matter from an answer is within the discretion of the court, especially where it cannot by itself constitute a defense. *Wehle* v. *Loewy.* 345

9. When the plaintiff's attorney is the person aggrieved by the scandalous matter, he may move to strike it out. It is no defense that no party to the action is aggrieved. *Id.*

10. In an action to recover a balance due on contract, the complaint alleged full performance on

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plaintiff's part. The answer denied full performance, and alleged and pointed out in what particulars and in what respect plaintiff failed to perform. *Held*, that the answer amounted simply to a general denial, and that no claim was made against plaintiff entitling him to a bill of particulars. *Strebell* v. *J. H. Furber Co.* 450

11. Where the defendant fails to controvert by answer the allegations of the complaint, such failure is to be taken as an admission of their truth. *Marx* v. *Gross.* 511

12. For the purpose of determining the basis of a cause of action for damages for the nondelivery of goods agreed by defendants to be delivered to plaintiff, the allegation of the answer of a contract of other terms or of a different character, has no function or effect. *Id.*

—— *In action for false imprisonment justification must be pleaded.*
See Wilson v. *Manhattan Railway Co.* 127

See AMENDMENT.
BILL OF PARTICULARS.
CONTRACT.
CORPORATION.
NEGOTIABLE INSTRUMENT.
STATUTE OF FRAUDS.

PRACTICE.

In granting provisional remedies, the courts do not proceed upon the technical rules of evidence regulating the final determination of rights of parties on a trial, but allow affidavit evidence, dispense with cross-examination, and are content with *prima facie* proof. *Globe Yarn Mills* v. *Bilbrough.* 100

See EXAMINATION BEFORE TRIAL.

PREMIUMS.

See INSURANCE.

PRINCIPAL AND AGENT.

See AGENCY.
BROKER.

QUANTUM MERUIT.

See BROKER.

RAILROAD.

1. In an action against an elevated railroad for damages to abutting property, the proximity of the railroad and its station to the premises in question, and the extensive communication with the premises thereby afforded, is evidence of benefits accruing to said property from the maintenance of said railroad, and the refusal of the referee to consider such, is error sufficient to grant a new trial. *Nette* v. *N. Y. Elevated R. Co.* 62

2. Plaintiff, and the conductor of the train upon which he was a passenger, got into a dispute as to whether a ticket offered by plaintiff had been punched on that train. At a station in New Jersey, the wrangle was renewed, and plaintiff at the instance of the conductor was arrested under a statute which authorized the arrest and detention of any person who attempts to travel in a carriage of any railroad company without having paid his fare and with intent to avoid payment thereof. Plaintiff had a verdict for six cents. *Held*, that as the trouble had its origin in an honest mistake, of which plaintiff was the responsible author, and the conductor acted without malice or evil intent, the verdict should not be set aside on ground of inadequate damages. *Toomey* v. *Delaware, Lackawanna, etc., R. Co.* 82

3. In an action for rental loss to plaintiff's premises from 1885 to 1888 resulting from the construction and operation of defendants' elevated railway, evidence as to how many buildings were erected in the street, the locality of plaintiff's premises, from 1878 to 1892, the time of trial, is inadmissible. *Sternberger* v. *Metropolitan Elevated Railroad Co.* 113

4. A witness for defendant as to rental value was asked on redirect: "Have you not during all this time used your best endeavor to

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get the best rent possible?" An objection that the question was incompetent, was sustained and defendant excepted. *Held*, no error; that the question, being leading, was inadmissible. *Id.*

5. In an action against an elevated railroad for past damages to plaintiff's premises, affecting their rental value, caused by the operation of the road, the testimony of a former tenant, that he moved away from the premises in question because they were dark and smoky, is competent and material. *Scott* v. *Metropolitan Elevated R. Co.* 150

See NEGLIGENCE.

RECEIVER.

See EXECUTION.

RECOGNIZANCE.

Remission of a forfeited recognizance should be granted upon filing the certificate of the district attorney to the effect that the expenses incurred in the apprehension of the accused, and the costs and expenses incurred in the enforcement of the forfeiture, have been paid, or that there were no such costs or expenses. *People* v. *Cohen.* 64

REFERENCE.

1. Where it appears to the satisfaction of the court that the trial of an action will involve the examination of a long account and that no difficult questions of law will arise on the trial, it may, on its own motion, refer the action. *Cassidy* v. *McFarland.* 86

2. The proof of work done and materials furnished in mechanic's lien cases where the answer denies all the allegations of the complaint always involves the examination of a long account. *Id.*

3. Where from a referee's report it is evident what are the terms of the judgment to which a party is entitled, there is a compliance with section 1022 of the Code of Civil Procedure. *Gold* v. *Serrell.* 224

4. Unsuccessful claimants of surplus moneys on foreclosure will be charged with the expenses of the reference. *Hyman* v. *Hauff.* 388

See LANDLORD AND TENANT. TRUSTS AND TRUSTEES.

RELEASE.

—— *Obtained by duress.*
See Lazzarone v. *Oishei.* 200

See CONTRACT.

REPLEVIN.

1. Where the drawer of a check delivers it to a third party upon his promise to deliver it to the person for whom it was intended, such party becomes a bailee for such person; and in replevin by such person for the check, such party is estopped to assert a right in himself to the check. *Haas* v. *Altieri.* 252

2. Plaintiffs replevined from the defendant, a sheriff, goods which the latter attached, under process, against R. and others. Plaintiffs claimed that the goods were attached in R.'s store, whither they had been sent by plaintiffs, "on memorandum," and at the time of the seizure by the sheriff, plaintiffs had the right to the immediate possession thereof. On the trial, it appeared that a clerk of R. came to the plaintiffs to select goods to be sent to R.'s store to compare with other goods, and if found of use, they would buy them; plaintiff testified that R. was absolutely entitled to their possession and control until they were demanded. The goods were never demanded except from the sheriff, after he had attached them. Plaintiff was nonsuited. *Held*, proper; that at the time the property was attached, the right of possession was vested in R. and not in plaintiffs. *Klee* v. *Grant.* 412

3. Also *held*, that if R. was to be considered as bailee of the plain-

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tiffs, his possession was not the possession of the latter, but was under a contract by which he had the right to retain the goods, upon paying the price, and his right to possession continued until he had refused to pay therefor, or to return the goods upon demand. *Id.*

See CHATTEL MORTGAGE.
PLEADING.
SALES.

RESCISSION.

See CONTRACT.

RESIDENCE.

See DOMICILE.

SALES.

1. In an action to recover for necessaries alleged to have been supplied to defendant's wife upon his credit, it appeared without contradiction that for nearly two years before the supplies were furnished, defendant and his wife were living in a state of voluntary separation, and during all that time the former had paid the latter a weekly allowance for her separate maintenance. *Held*, that a tradesman who supplied the wife with necessaries, upon the credit of the husband and without his express sanction, did so at his peril. If it could be shown that in consequence of the inadequacy of the husband's provision the necessaries were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse and her station in the community, a different rule would apply. *Bloomingdale* v. *Brinckerhoff*. 49

2. In an action by plaintiff, as assignee of one J. C., to recover the value of clothing alleged to have been consigned for sale by plaintiff's assignor to defendant, the latter admitted the receipt thereof, but denied it was of the value alleged, or that the clothing was the property of plaintiff's assignor, or consigned to him by the latter, but on the contrary alleged that the same was consigned to him for sale by one B. C., the owner, for whose account it was sold, and that the proceeds, after deducting therefrom the commissions and expenses of sale, as well as a demand existing in favor of defendant against said B. C., were remitted to the latter. In giving judgment for plaintiff, the trial justice credited defendant with the amount of his claim against B. C. *Held*, that having credited plaintiff's claim of ownership, it was error to credit the defendant with the amount of his claim against said B. C. *Cohen* v. *Salet*. 51

3. Pending an offer made on March eighteenth, in Chicago, for the sale of a carload of eggs by a seller to an intending buyer, the seller represented that the eggs were then in car, and would be shipped that evening so as to be delivered in New York in due time; and upon the faith of such assurance plaintiff bought and paid for the eggs. The shipment was not made until March nineteenth. In an action to recover damages for breach of contract, *held*, that defendants were liable. *Fitch* v. *Kennard*. 95

4. The contract of sale and purchase was made by one D., an employee of the firm of brokers who negotiated the sale. When defendant and other witnesses were asked to give the conversation at the time of the making of the contract between defendants and D., the evidence was rejected on the ground that D. was defendants' agent, and that they were concluded by his testimony. *Held*, that assuming that he was defendants' agent, although the undisputed evidence showed that he was plaintiffs' agent, defendants had a right to contradict D.'s version of the transaction, and the exclusion of the evidence was error calling for reversal. *Id.*

5. In an action to recover the purchase price of goods sold and delivered, it appeared that after the date when, under the contract, the goods should have been delivered, they were shipped at

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defendants' request, received, accepted and retained by them without objection as to tardy arrival. *Held*, that defendants had waived the default in delivery, and were estopped from setting up the belated delivery as a defense. *Nicholas* v. *Venable*. 109

6. Defendant, an infant, obtained of plaintiff, under a conditional bill of sale, a sewing machine, title to which was to remain in plaintiff until it was paid for in full, and in the event of defendant failing to pay the installments as agreed, plaintiffs were compelled to take back the property, and installments actually paid were to be regarded as money paid for the use thereof. In an action of replevin, the defense interposed was infancy and a counterclaim for the amount paid on the property. Judgment having been rendered for plaintiff, defendant appealed. *Held*, that the defense set up would be a valid one if the action had been founded upon contract; replevin, however, being a tortious action lies against an infant; that the bill of sale in question must be regarded as an executed contract as far as the payments actually made were concerned; and that defendant cannot recover thereon. *Wheeler & Wilson Manfg. Co.* v. *Jacobs*. 236

7. In an action against partners for goods sold and delivered, the evidence of one partner that he purchased the goods for the firm, corroborated by another witness for plaintiff, justifies the direction of a verdict for plaintiff, although the other partner testifies that the goods were not so purchased but were put into the firm by his partner as part of the capital stock. *Weiss* v. *Bloch*. 455

8. The affidavit of M. averred that defendant, while negotiating a purchase of goods from M.'s principal, stated, among other things, that his firm owed no other borrowed money, and that relying upon the truth of said statement and believing that defendant's firm owed all told for merchandise $27,500, to two banks $25,000, and no other borrowed money, as stated, sold and delivered goods to defendant's firm. That, in fact, deponent is informed and believes that at the time said statement was made, defendant's firm were owing other persons from $10,000 to $15,000 borrowed money; that the sources of deponent's information and grounds of belief are contained in the annexed affidavit of B. In B.'s affidavit no proof appeared that the indebtedness of defendant's firm to the other persons was for borrowed money. *Held*, that plaintiff's papers were insufficient to sustain the order of arrest. *Lee* v. *Corn*. 468

9. Defendant, by contract of sale, agreed that he would convey and assure to plaintiff certain premises, by good and sufficient deed, subject to a mortgage of $1,000. Upon the execution of the contract, August tenth, plaintiff paid to defendant, on the purchase price, $500. Thereafter it was ascertained that there was another mortgage upon the premises, to foreclose which action had been brought prior to the execution of the contract of sale. The premises were sold and conveyed under the judgment in the foreclosure action. In an action brought to recover the $500 paid to defendant, *held*, that plaintiff was entitled to recover without proving either that he demanded of defendant a performance of the contract on his part, or tendered performance on his part. *Ziehen* v. *Smith*. 487

10. Plaintiff at an auction sale of foreign fruit, agreed with defendants to make a deduction from all purchases made by them. One E. bought some dates at the sale, and it turned out afterwards that he made his purchases for defendants. *Held*, that defendants were not entitled to any allowance on the goods sold to E. *Nixon* v. *Zuricaldy*. 541

—— *Under execution, when invalid.* *See Stonebridge* v. *Perkins*. 162

See FRAUD.

GOODS SOLD AND DELIVERED.

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SHERIFF.

See REPLEVIN.

SPECIFIC PERFORMANCE.

1. A father orally agreed with three sons that if they would purchase certain land and cause it to be conveyed to him for a home for life, he would devise the premises to them by his will. The sons purchased the land, paying therefor before their father's death. The father died, leaving a will devising the land as agreed, but it was lost or destroyed. *Held*, that as the sons had fully executed the agreement on their part, specific performance of the agreement on the part of their brother who refused to convey his interest would be decreed. *Korminsky* v. *Korminsky*. 138

2. *Held*, further, that on the death of their father, plaintiffs became the equitable owners of the land and the court had power to decree the equitable title to be a legal one and enforce it by compelling a specific performance of the agreement by the heirs refusing to deed their interest. *Id.*

3. Two sisters of the parties, who had deeded their interest in the premises to plaintiffs, were allowed to testify as to conversations with their father relating to the said agreement and his will. *Held*, that section 829 of the Code did not apply, and exceptions to their testimony based thereon were of no avail, as they were in no way interested in the event of the action, nor was plaintiffs' claim derived by assignment or conveyance. *Id.*

STATUTE.

—— *Repeal of.*
See People ex rel. Reynolds v. *Common Council of Buffalo*. 7

—— *Provisions of Mechanics' Lien Law to be strictly complied with.*
See McMahon v. *Hodge*. 234

STATUTE OF FRAUDS.

1. The defense must be pleaded, unless the complaint on its face discloses a case within the statute. *Pohl* v. *Pontier*. 143

2. Where it appears on the face of the complaint, that the promise to pay the debt of another was oral and collateral, the defense of the Statute of Frauds is available though not pleaded. *Ridgway* v. *Grace*. 293

3. When, after a contract for the sale of personalty, the seller, buyer and a third person agree that the latter shall become the purchaser instead of the original buyer, such substituted agreement is not within the Statute of Frauds as an engagement for the debt of another. *Compton* v. *Mellis*. 301

4. The test to determine whether an agreement to pay the debt of another is within the Statute of Frauds, is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of default of a third party. *Flagler* v. *Lipman*. 417

See CONTRACT.
GOODS SOLD AND DELIVERED.

STATUTE OF LIMITATIONS.

Defendants chartered plaintiff's boat and agreed to pay the wharfage, at the place of destination, to the owner or lessee of the wharf. Defendants having made default in the payment of the wharfage when due, March, 1882, plaintiff paid it, and in August, 1888, brought suit to recover the amount, with interest. *Held*, that the Statute of Limitations was a defense. *Compton* v. *Heissenbuttel*. 340

See EXECUTORS AND ADMINISTRATORS.

STOCKHOLDER.

See CORPORATION.

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STIPULATION,

See MASTER AND SERVANT.

SUMMARY PROCEEDINGS.

1. The judge before whom a summary proceeding to recover the possession of real property is instituted, has no legal power to adjourn the matter to a future day on his own motion in default of an answer by the tenant. *People ex rel. Allen* v. *Murray.* 152

2. On September thirtieth, the return day of a precept in summary proceedings instituted in a District Court, the justice demanded of the attorney who appeared for the landlord, proof of his authority to appear. The attorney refused to make such proof and moved for judgment and the usual warrant to dispossess the tenant. The justice on his own motion adjourned the proceedings to October third, to enable the attorney to produce proof of his authority to appear. On the adjourned day neither the landlord nor his attorney appeared and the proceeding was dismissed. *Held*, a proper case for a mandamus commanding the justice to do what, on September thirtieth, he ought to have done. *Id.*

See JUDGMENT.
MORTGAGE.

SUPPLEMENTARY PROCEEDINGS.

1. The service of an order in supplementary proceedings gives a judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor. *Duffy* v. *Dawson.* 401

2. A judgment debtor is guilty of contempt if after service upon him of the usual order in supplementary proceedings, he borrows money and pays the same to creditors. *Rainsford* v. *Temple.* 454

SURROGATE'S COURT.

1. A surrogate has no jurisdiction to try and pass upon the validity of a claim due from the estate to a firm of which the executor is a member. *Matter of Jones' Estate.* 221

2. In such a case, the executor may pay the firm, and on filing a voucher therefor, ask credit for the amount on the accounting, at which time any interested party may question the propriety of its payment. *Id.*

See EXECUTORS AND ADMINISTRATORS.

TAXATION.

See COSTS.

TRESPASS.

1. Defendants, having excavated their lot to a depth of twenty-two feet, made a contract with an experienced contractor to shore up the southerly wall of the adjoining building occupied by the plaintiffs. The employees of this contractor entered upon the premises of the plaintiffs without their authority or permission, broke open the wall of the building, put large beams or needles through the wall and upon the premises, and did material damage to plaintiffs' property. No claim was made that the work of shoring up was negligently or improperly done, or that it could have been done in any other way than that employed. In an action of trespass, *held*, that the defendants were liable equally with the contractor. *Ketcham* v. *Cohn.* 427

2. Chapter 6 of the Laws of 1885, does not modify the owner's common-law right to make excavations upon his own land, but merely imposes upon him a statutory duty which he is bound to perform on the condition named in the law. But neither said statute nor any other rule of law gives the party making the excavation, liberty or license against the will of the owner of the adjacent lot to commit a trespass upon his premises. *Id.*

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TRIAL.

1. It is not proper to refer to the testimony of a witness and ask the court to charge that if the jury believe the witness they must find in a certain way, or that a certain conclusion follows, as it prevents the jury from determining what facts are established by the witness' evidence. *Gerding* v. *Haskin.* 172

2. So far as it relates to the issues on trial, it is error to exclude the cross-examination of plaintiff on a former trial, unless the attention of the witness is first called to it; nor is the error cured by afterwards admitting portions of it in rebuttal, in order to impeach the witness. *Fisher* v. *Monroe.* 326

3. Where a hypothetical question, put to an expert witness, does not fully and fairly state all the facts which have been proved in the case, bearing upon the issues to be determined, it is error to admit the testimony. *Id.*

4. When plaintiff rests, any defect in proof is cured by evidence received after denial of a motion to dismiss the complaint. *Carroll* v. *O'Shea.* 437

5. Failure to renew a motion for dismissal or to ask for the direction of a verdict concedes the sufficiency of the evidence for submission to the jury. *Id.*

6. If the record shows any evidence, however slight, tending to prove plaintiff's case, it is error for the trial court to dismiss the complaint or order a nonsuit. *Hassett* v. *McArdle.* 461

7. In such case, the court should not grant a nonsuit on the assumption that plaintiff's witnesses are not to be believed, but is bound to assume the facts which plaintiff's evidence legitimately conduces to prove, although their correctness may be controverted by the evidence for defendant. *Id.*

8. An equity action may by order be taken from its regular place upon the calendar and put upon short cause calendar as a preferred cause. *McHugh* v. *Astrophe.* 478

9. It is immaterial that the order recites that the trial shall take place in a part of the court where equity causes are not tried, if in fact it appears on the calendar of the proper part and is answered to by the attorneys. *Id.*

10. At the trial, defendant obtained leave to withdraw a juror upon paying the costs and disbursements of the action up to date. These costs were paid, and the answer amended. Final judgment was obtained by plaintiff. *Held,* that plaintiff could not include in his bill of costs the costs paid as a condition of obtaining leave to amend; that the order allowing amendment was an adjudication that the costs imposed belonged to plaintiff, and that they could not be again taxed in favor of either party. *Marx* v. *Gross.* 500

11. Plaintiff's intestate brought action against defendant to recover a sum of money. On the trial a verdict was rendered for defendant, but on appeal was reversed, and a new trial ordered. After the reversal and before the new trial, plaintiff's intestate died, and plaintiff, his widow, was appointed his administratrix. Before his death, plaintiff had received a transfer of the cause of action as collateral security for a loan which she had made him, and after his death upon petition, an order was made on notice to defendant, reviving the action, and substituting plaintiff individually and as administratrix, instead of the original plaintiff. When the cause came on for retrial, counsel for defendant raised the objection that the cause of action in the plaintiff individually could not be united with the cause of action in her as administratrix, which objection was overruled. *Held,* proper; that the question of title was determined by the decision on the order of substitution, and could not be raised upon the trial. *Milbank* v. *Jones.* 503

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12. As the actual pertinency of a question will only appear upon the introduction upon the trial of some evidence which then makes it pertinent, a judge settling interrogatories cannot hold that such a contingency will not arise. *Fry* v. *Manhattan Trust Co.* 520

See APPEAL.
CONTRACT.
EVIDENCE.
NEGLIGENCE.
NEW TRIAL.
PLEADING.
RAILROAD.
REPLEVIN.
WILL.

TRUSTS AND TRUSTEES.

1. The widow of R., the sole surviving executrix and trustee of his will, prior to her death loaned to one T. C. R. $3,100 belonging to the estate, and in addition placed in his hands for investment other moneys belonging thereto. By consent he was thereafter appointed "substituted trustee." On accounting, *held*, that her estate was liable for any profits earned by those sums prior to her death, and in respect thereto the substituted trustee could not be treated as an executor *de son tort*. *Estate of Richardson.* 288

2. *Held*, also, that the accounting party properly omitted to charge himself with the amounts of certain policies of insurance on the lives of debtors to the estate and still running, and with the amount of the interest of the estate in a fund in liquidation, and with certain collaterals to loans made to himself, as they were not cash in hand or its equivalent. He should have set them forth, however, in his account, as he can be called upon to render a further account thereof when realized on. *Id.*

3. *Held*, also, that he should be charged with whatever profits he has realized from the use of the money he borrowed from the estate, or any bonus he may have received for the loan of the fund. If, however, he realized less than legal interest, he must be charged with the deficiency. *Id.*

4. *Held*, also, that if T. C. R. is to be regarded as an executor and trustee, his acts and dealings with the estate from the date of the death of the widow and prior to his appointment as a mere common-law trustee, are reviewable by the surrogate like those of an executor *de son tort*, the order appointing him relating back to the time when he assumed control of the funds. *Id.*

5. *Held*, also, that commissions cannot be taken prior to an accounting. *Id.*

6. *Held*, also, that an executor should keep his own accounts, and if he cannot, then he should pay for the work belonging to him to do, out of his own pocket. *Id.*

7. *Held*, also, that after a referee to pass upon an executor's accounts has filed his report he cannot make an additional finding. *Id.*

8. One S. conveyed to M. certain premises upon trust to receive the issues, rents and profits thereof, and apply the same to the use of said S. during the joint lives of the said S. and one P., whom he was about to marry, and, after the death of said S., to apply the same to the use of the said P. during the time of her natural life, provided, nevertheless, that should the said P. marry after the death of said S., the said trust thereby created was to cease and determine in like manner as if she were actually dead, and after her death, the fee in said premises, as well as the uses and profits thereof, were to revert to and vest in the heirs at law of said S., at which time the trust created was to cease and determine. There was a recital in the deed that said P., upon condition of the performance and execution of the said trust, released all her dower and right of dower in and to said premises. No power of sale was given to the trustee, and the deed was signed by S. and P. On the death of said S. and P., an action was brought by an heir at law of said S. for a partition of said property.

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invest the proceeds thereof for the benefit of said daughter. After the death of testator, the daughter died leaving issue. Thereupon plaintiff contracted with defendant for the sale of the real estate. Thereafter the latter refused to take title on the ground that the death of the daughter deprived plaintiff of the power of sale. *Held*, that the power of sale was intended to be exercised for the benefit of both plaintiff and the daughter; that it was coupled with an interest in plaintiff and did not lapse with the death of the daughter. *Cotton* v. *Burkelman*. 165

2. On August 8, 1888, testator made his will, leaving to his wife a legacy of $500, "as ten thousand dollars of life insurance is in her name, and she has proven herself not to be a loving wife." He died in April, 1890, in an insane asylum, of progressive paresis, a mental disorder which has its incipiency about three years before death, and indicates its presence by three consecutive stages, the first two being accompanied by delusions. *Held*, that this evidence was conclusive that, at the time of the execution of the paper propounded as his will, he was unduly influenced by delusions which injuriously affected his natural regard for his wife, and a finding by a jury that testator was not possessed of testamentary capacity should not be disturbed. *Matter of Loewenstine's Will*. 323

3. To establish the existence of said mental disorder, contestant offered the testimony of two physicians who had been in actual professional attendance upon deceased. This was objected to under section 834 of the Code. The court ruled that the witnesses were competent to testify to any knowledge obtained from personal acquaintance with decedent before their professional relations with him commenced and after they ceased, and excluded all testimony affecting knowledge obtained during the pendency of the relation. *Held*, that the ruling was proper. *Id.*

4. A physician, pending a visit to the medical superintendent of the asylum, during which he assisted the superintendent in the discharge of his official and professional duties, had secured knowledge of testator's condition, and was permitted to testify as to the same. *Held*, that under section 836 of the Code of Civil Procedure, as amended, Laws 1892, chapter 514, the testimony was competent. *Id.*

5 On a jury trial of the issues arising on the probate of a will, the widow of testator testified as to transactions between herself and husband; a sister testified as to what deceased had told her in regard to the wife; the physician gave testimony as to whether testator had the disease he imagined he had, and the clergyman testified as to conversations he had with testator. No objection was taken to this testimony when offered, and no motion made during the trial to strike it out. *Held*, that as the facts testified to by the above witnesses were established by the competent testimony of other witnesses and by deceased's own letters, no injustice was done calling for reversal and a new trial. *Matter of Gannon's Will*. 329

6. A separation agreement executed in 1890, is not admissible on a contest of the husband's will made in 1887, to show the motive for peculiar provision of the will. *Id.*

7. The issues in a will contest having been tried before a jury, they found that decedent had testamentary capacity at the time of the execution of the will, but it was also established that the testator was a monomaniac in respect to his wife's fidelity, and as to her having communicated to him a venereal disease, and that this was a delusion affecting the will. *Held*, that an order setting aside the will should be affirmed. *Id.*

See TRUSTS AND TRUSTEES.

WITNESS.

The testimony of a witness who is found to have intentionally sworn

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falsely on a material issue in the action, is of no legal force or effect as to another matter in respect of which he is contradicted and is not sustained by corroborative evidence; and a judgment resting on such testimony alone will be reversed as without evidence. *Morgenthau* v. *Walker*. 245

——*Not proper to charge jury, if they believe must find in certain way.* *See Gerding* v. *Haskin*. 172

See BROKER.
MASTER AND SERVANT.
NEW TRIAL.
TRIAL.
WILL.

WORDS AND PHRASES.

"In benefit." *Weiss* v. *Tennant*. 213

"Two weeks notice either side." *Haines* v. *Thompson*. 385

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